

EFFECTIVE JANUARY 24, 2022

The Entire Keightley & Ashner Team Has Joined  
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## DEFINED BENEFIT PLANS

The coming year promises to be one with major ramifications for the retirement security of many defined benefit plan participants. The continuing demise of single-employer plans may get an even greater push in 2016 as plan sponsors consider the benefits of de-risking in the face of rising plan premiums combined with the realization that participant lump-sum payouts won't be quite the bargain once required mortality-table life expectancy changes take hold in 2017. The year is also likely to include a relative flood of financially struggling multiemployer plans filing petitions with the Treasury Department—up from the two known filings in 2015—saying they needed to cut participants' accrued pension benefits to save their plans from future insolvency.

### De-Risking and Rescue Plan Petitions Expected to Rise

**T**he de-risking of single-employer defined benefit pension plans and the suspension of benefits by multiemployer plans are poised to be two of the primary issues facing pension plan sponsors and participants in 2016.

In the single-employer arena, plan sponsors entered 2016 facing high and rising plan premium obligations to the Pension Benefit Guaranty Corporation's single-employer plan insurance program, itself an increasingly significant factor in discouraging the maintenance of such plans. At the same time, this is also the year before impending mortality table changes go into effect that will make lump-sum distributions to plan participants more expensive for plan sponsors.

This combination makes it likely that 2016 will be a strong year for sponsors to remove participant obligations from their plans, practitioners and industry observers said in interviews in December and early January.

Meanwhile, a number of trustees of financially troubled multiemployer defined benefit plans will be considering whether to use new tools available under the Multiemployer Pension Reform Act of 2014, also known as the Kline-Miller Act. Two multiemployer plans—the Central States, Southeast and Southwest Areas Pension Fund and the Iron Workers Local 17 Pension Plan—filed rescue plans in late 2015, and others are likely to follow.

Pension rights groups are pledging to redouble their efforts to help pass legislation that will eliminate or reduce the benefit cuts permitted under the MPRA as participants have flooded lawmakers and regulators with painful stories of the expected impact of proposed cuts.

Practitioners also expect to see expanded PBGC activity related to the agency's early warning program and multiemployer plan partitions, along with the issuance of a proposed rule on plan mergers. In addition, it is likely that Congress this year will introduce legislation that could disconnect multiemployer plans from the PBGC's pension insurance system.

### De-Risking Incentives

Former PBGC Director Joshua Gotbaum, now a guest scholar with the Brookings Institution in Washington, told Bloomberg BNA that there likely will be a continuation of the long-standing move of employers to leave single-employer defined benefit plans.

Gotbaum said this is partially fueled by unnecessarily high and rising PBGC premiums, which give employers an extra incentive to stop offering such plans (241 PBD, 12/16/15). He said single-employer premiums, needed to fund the PBGC's insurance program for such employers, have been set by Congress at such a high level that they have "become more a part of the problem than a part of the solution."

Congress in October passed increases in single-employer premiums for the third time since 2012, hiking flat-rate premiums 25 percent from 2017 through 2019 and variable-rate premiums that underfunded plans pay by at least 37 percent over those three years (211 PBD 211, 11/2/15).

Benefit plan consultants are telling plan sponsors that with premiums as high as they are, this would be a good year to transfer their pension plan risks by offering lump-sum distribution options to their deferred vested participants—those who are no longer employed by the company but have yet to retire—Gotbaum said. The Internal Revenue Service in July banned another formerly popular de-risking practice: lump-sum offers to participants in pay status—those already receiving benefits (132 PBD, 7/10/15).

Gotbaum said distributions to former workers who aren't yet getting benefits are particularly attractive this year because the "government is, in effect, offering a temporary discount to sponsors on the price of lump sums." That's because the federal government pushed back until 2017 the required use of new mortality tables used by plans to calculate lump-sum payouts, Gotbaum said. So, he said, while insurers have raised group annuity prices for plan sponsors to reflect longer life expectancies, employers can still use the outdated and shorter life expectancies this year in determining lump sums, making such distributions a relative bargain for them—and almost always a bad deal for participants. That's a major reason why companies are acting now to offer them, he said.

He added that lump-sum distributions are a "huge problem that neither the DOL nor Treasury want to take ownership of." For example, Gotbaum said, the IRS could have required that plan sponsors use the new tables much sooner.

Phyllis C. Borzi, assistant labor secretary for the Department of Labor's Employee Benefits Security Administration, told Bloomberg BNA that the ERISA Advisory Council's model notice recommendations on risk transfers, which included a lump-sum distribution notice, were a "terrifically helpful start" and were being seriously looked at.

Jan Jacobson, senior counsel for retirement policy at the American Benefits Council in Washington, told Bloomberg BNA that the PBGC's collection of information from plan sponsors on their de-risking activity could be a precursor to the agency taking action to get involved in such transactions (238 PBD, 12/11/15).

Matt McDaniel, a partner in Mercer's Retirement Business in Philadelphia, agreed that lump-sum cash-outs will be less expensive for plans this year than going forward. However, he said it was uncertain whether lump sums will be more popular this year with plan sponsors than annuity buyouts, which he said will also become less expensive as interest rates rise.

He explained that participants can't be forced to take lump-sum payouts, since participants must voluntarily elect them. In addition, there is the IRS prohibition on lump-sum offers to participants already receiving retirement payments, which will reduce the potential number of overall lump-sum offers, McDaniel said.

Despite the Treasury's prohibition on employers offering lump-sum windows to participants in pay status, Gotbaum said that many participants who aren't yet in pay status, perhaps "hundreds of thousands," will still be eligible to take such distributions.

Karen Friedman, executive vice president and policy director for the Pension Rights Center, told Bloomberg BNA that her organization expects that de-risking will continue in 2016 as a "way for employers to dump their pension obligations and risks on to third-party insurance companies or on to individuals themselves."

With regard to group annuity purchases, Friedman said her group wants Congress to conduct a "larger examination of the risks that arise," including what happens when insurance companies become insolvent or when smaller insurers get in the game, the strength of the state guaranty associations that back up the insurers, what protections under the Employee Retirement Income Security Act participants lose in group annuity purchases and whether there are protections against creditors.

With regard to lump-sum offers, Friedman said her group will continue to raise concerns since "many of these deferred vested participants may be tempted to trade in the security of defined benefit plans for a one-time cash payment that will be inevitably spent on short-term needs, leaving them nothing for retirement."

## Multiemployer Plan Tools

While single-employer plans face hurdles in the upcoming year, they might seem like molehills compared with the jagged mountains the multiemployer plan system faces.

For one, while the single-employer insurance program is relatively healthy, the multiemployer plan insurance program has high deficits that are projected to continue indefinitely, Michael P. Kreps, a principal with Groom Law Group Chartered in Washington and previously senior pensions and employment counsel for the Senate Health, Education, Labor and Pensions Committee, told Bloomberg BNA.

The PBGC said in November that its multiemployer program deficit rose 23 percent to a record-high \$52.3 billion in fiscal year 2015 (222 PBD, 11/18/15). When the deficit set a record high two years earlier, the shortfall was \$8.3 billion (222 PBD, 11/18/13).

The trustees of two plans, the \$17.8 billion Central States Pension Fund (192 PBD, 10/5/15) and the much smaller Iron Workers Pension Plan, each decided in 2015 to seek approval from the Treasury Department under the MPRA for a proposal to suspend the accrued benefits of the fund's participants, saying they needed to do so to avoid future insolvency (06 PBD, 1/11/16).

Kreps said a number of multiemployer pension plans are considering filing such proposals this year. Most plans are waiting for Treasury to issue final regulations on suspensions and to observe how Central States' proposal plays out, he said (117 PBD, 6/18/15).

Randy G. DeFrehn, executive director of the National Coordinating Committee for Multiemployer Plans, told Bloomberg BNA that congressional pressure may continue the revamping of the multiemployer plan system that it began when it passed the MPRA. DeFrehn pushed for the change, as well as others proposed in his organization's 2013 report "Solutions not Bailouts" (34 PBD, 2/20/13).

The NCCMP's proposal includes a new plan design, known as "target" or "composite" plans, as an alternative to current multiemployer defined benefit plans, with a modified defined contribution plan. These composite plans would eliminate individual accounts, pool

longevity risk and require benefits to be paid in a life annuity. The proposal would also provide professionally managed investments at low negotiated fees, prohibit account leakage and install a funding mechanism that both limits employer obligations and seeks to protect participants from investment market risk. Such plans wouldn't participate in the pension insurance system.

DeFrehn said he also expects Congress to increase multiemployer pension plan insurance premiums in the coming year to help reduce the program's deficit, but preferably not to a level that compels sponsors to withdraw from their plan commitments.

Referring both to revamping the multiemployer plan system and raising premiums, DeFrehn said he believes that Rep. John Kline (R-Minn.), chairman of the House Education and the Workplace Committee, "wants to get this done."

## Controversial Legislation

Friedman said that the Pension Rights Center will be "redoubling its efforts" this year to stop the "terrible retiree cutbacks" authorized by the MPRA and to find other ways to address multiemployer plan underfunding, such as those proposed in legislation introduced in June by presidential candidate Sen. Bernard Sanders (I-Vt.) that would repeal the MPRA benefit suspension provisions (118 PBD, 6/19/15).

Sen. Rob Portman (R-Ohio) in October also introduced a bill in the Senate that would give participants of multiemployer plans who face potential pension benefit cuts more weight in the participant voting process on rescue proposals (195 PBD 195, 10/8/15).

Friedman said "there needs to be a solution with shared responsibility, and not a solution that devastates the most vulnerable." She added that "once tens of thousands, if not millions, of people speak up on this, Congress will realize they made a terrible mistake passing the MPRA cutback provisions."

Gotbaum said he is no fan of the bills introduced by Sanders or Portman. Without the MPRA, he said, the "multiemployer plan system would be heading for a collapse." Legislative efforts to undermine the MPRA aren't likely to succeed, but if they did, the "multiemployer plan system will collapse," he warned.

Friedman, however, said that "we would expect that everyone would embrace" solutions that would "save both the multiemployer plan system and the PBGC while preventing retiree pension cuts."

## Other Areas of Expected PBGC Activity

Addressing other areas in which the PBGC might take action in 2016, Harold J. Ashner, a partner with Keightley & Ashner LLP, told Bloomberg BNA that single-employer plan sponsors need to be aware that the agency is likely to increase its early warning program activity, particularly where issues arise under loan agreements.

He said the PBGC's new reportable events rules, which became effective on Jan. 1, dramatically increase reporting of loan defaults by capturing not only defaults that are purely technical in nature, but also defaults that have been cured and even situations in which there isn't any default because the lender waived the default or agreed to amend a loan agreement provision (176 PBD, 9/11/15).

Ashner, who formerly served as the PBGC's assistant general counsel for legislation and regulations, said that due to these enhanced reporting requirements, he expected the agency to attempt to get involved in plan sponsor operations and transactions well in advance of possible bankruptcies.

Another tool newly available to plan sponsors in 2016 is the agency's enhanced authority to partition financially troubled multiemployer plans not yet in bankruptcy (246 PBD, 12/23/15). The PBGC is also expected in early 2016 to issue a proposed rule permitting the merger of troubled multiemployer plans into healthier ones.

Under newly issued regulations on partitioning, the PBGC can sever from a plan its liability for benefits attributable to service with financially troubled employers, provided that this will significantly reduce the risk of the plan becoming insolvent. These partitioned benefit obligations are combined in a new plan, with the PBGC providing the partitioned plan with financial assistance to cover the cost of PBGC-guaranteed benefits and reasonable administrative expenses.

With multiemployer plan premiums at \$27 per participant, compared with \$64 per participant for single-employer plans, Kreps said the PBGC lacks the resources to conduct many partitions. Smaller plans, if any, are the most likely to benefit from this, he said.

Plan mergers will be helpful for some plans in 2016, he said, as they will reduce plan administrative costs. Smaller plans, in particular, will benefit, since many have high administrative expenses, Kreps said.

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