SEYFARTH SHAW LLP ATTORNEYS

One Minute Memo®

End of First Quarter Triggers Issuance of Multiemployer Pension Plan Notices Pursuant to the Pension Protection Act

If you participate in a multiemployer pension plan, and your plan operates on a calendar year basis, check your mail. Each multiemployer plan is required have its actuary certify no later than the 90th day of the plan year whether the plan is in endangered or critical status under the Pension Protection Act of 2006 (PPA). Any plan certified as endangered or critical is then required, within 30 days, to so notify the participants, beneficiaries and bargaining parties.

For any plan operating on a calendar year basis, its actuary by now should have certified whether the plan is critical or endangered. Many participating employers have started to receive their certification notices, and more should come throughout the month. Given the interest in this area, many plans that have been certified in the "green"—neither endangered nor critical—also are issuing notices declaring their status. The PPA does not indicate whom within a participating employer is to receive the certification notice. If you have not received a notice, it is possible it was mailed to the specific facility participating in the plan, or to an accounting or payroll person who may submit the contributions. Find the notice, and if you cannot, ask the plan to have another notice sent out.

These notices are important. They will be the first official notification as to whether your plan is endangered or critical. The certification and resulting notices also trigger certain obligations upon both the plans and employers. Any plan certified to be endangered or critical must (1) timely adopt a funding improvement plan (FIP) (if endangered) or a rehabilitation plan (RIP)(if critical), and (2) timely prepare and issue schedules to the bargaining parties containing various options of benefit revisions and/or contribution increases necessary for the plan to improve its funding status. Each employer and participating union will, during negotiations for their next agreement (if not sooner), have to adopt one of the prepared schedules.

Moreover, for a plan in critical status, 30 days after it notifies participating employers of its status the plan must assess a surcharge equal to 5% of its pension fund contributions otherwise required under the applicable collective bargaining agreement. This surcharge increases to 10% in subsequent plan years. The surcharge applies to any employer that has yet to negotiate benefit language consistent with one of the plan schedules, and will remain in effect until the employer negotiates an agreement (or, in the event the parties cannot reach an agreement after the contract expires, when the plan imposes the "default schedule" upon the earlier of a bargaining impasse certified by the Secretary of Labor or 180 days after contract expiration).

Many plans are adopting their FIPs and RIPs now, and sending their schedules at the same time as the certification notices. This permits employers of critical plans the chance to negotiate a RIP schedule early to avoid the surcharge. Some schedules issued to date have taken surprising approaches. One plan set up its default schedule—the schedule wherein all adjustable benefits are eliminated and future benefit accruals reduced to the statutory minimum prior to any increases in employer contribution levels—so that the required contribution increases were more expensive than the preferred schedule which preserved more pension benefits. The effect is to force all parties to adopt one schedule. Another plan has declared that the employees of any employer that ceases having an obligation to participate in the plan (by negotiation, decertification, or otherwise) will have their adjustable benefits eliminated unless they promptly quit their jobs and sign on with another participating employer. Such penalties for withdrawal will make it more difficult for employers who wish to negotiate out of the plan.

Any employer that has received a notice and the schedules must address several questions:

1. What is the funding status of the plan?
2. If the plan is certified critical or endangered, what FIP/RIP schedules has the plan prepared for the employers and unions to negotiate?
3. Has the plan complied with the PPA in terms of meeting its deadlines and developing legally compliant FIP and RIP plans? If not, does the employer wish to take legal action to force compliance?
4. If the plan is critical, do the employer's current contracts already comply with one of the proposed schedules, such that it can avoid the surcharge?
5. If not, is the employer—or its participating employees —financially better off paying the surcharge rather than negotiating one of the schedules before contract expiration? From a bargaining relationship standpoint, what makes sense?
6. Does the employer have reopener language, or some other contractual or legal basis upon which to compel mid-term collective bargaining over the surcharge and the schedules (and their potential additional costs) before the contract expires?
7. If not, and the employer still wishes to bargain, what bargaining approach will work best to obtain the union's agreement on what would be a permissive issue?
8. Having seen the status of the plan and its proposed schedules, does the employer still wish to continue participation in the plan? If not, what bargaining or other strategy will it develop to successfully negotiate itself out when its contracts expire? What alternative pension benefits will it propose? What concessions is it prepared to make? Is it prepared to take a strike? What would the employer's withdrawal liability be if it withdrew? Is it prepared or able to pay if it withdraws? Could any withdrawal liability assessment be challenged?

Should you wish to discuss these and other issues related to your multiemployer pension plan participation, please contact the Seyfarth Shaw attorney with whom you work, or any Employee Benefits attorney on our website, www.seyfarth.com.