

February 2006

New: Annual Funding Notice for Multiemployer Plans

The DOL's Employee Benefits Security Administration (EBSA) has issued a final regulation regarding the new annual funding notice that multiemployer defined benefit pension plans must begin providing this year to: (i) contributing employers, (ii) plan participants and beneficiaries, (iii) the unions representing those participants and beneficiaries, and (iv) the Pension Benefit Guaranty Corporation (PBGC). The final regulation includes a model notice that multiemployer plans may adapt. [A copy in Word format is available upon request through the Seyfarth Shaw attorney with whom you work or on our website, which can be accessed by clicking here.]

The obligation to provide the notice was added to ERISA by the Pension Funding Equity Act of 2004. According to the EBSA, the purpose of the notice is to provide all those parties interested in a plan's financial viability the opportunity to monitor the plan's funding status. In the past, it has often been difficult for employers contributing to multiemployer pension plans to obtain current data regarding a plan's funding status.

Timing of Notice

Multiemployer pension plans are required to begin issuing the funding notice for the first plan year beginning after December 31, 2004. The notice must be provided within nine months after the close of the plan year, unless the plan has been granted an extension of time to file its annual Form 5500. If the plan has been granted an extension, the notice must be provided no later than two months following the extension period. For a calendar year plan, the Form 5500 must typically be filed by July 31, and an extension may be granted for an additional two and half months. Accordingly, a multiemployer plan with a calendar year plan must issue its first funding notice by September 30, 2006, for the 2005 plan year or, if the plan obtained an extension to file its 2005 Form 5500, by December 15, 2006. Under ERISA Section 502, a plan administrator is subject to a penalty of up to \$110 a day for each failure to provide the notice to a plan participant or beneficiary. It is unclear at this point what enforcement mechanism will be used with respect to a

failure to provide the notice to employers and unions.

The annual funding notice is not conditioned upon a plan's funding level - the notice must be provided even if the plan is fully funded. Plans receiving financial assistance from the PBGC are not required to issue the annual funding notice since such plans are already subject to notice requirements under the rules governing insolvent plans. Furthermore, EBSA clarified that a plan administrator is not required to provide the notice to other entities in an employer's controlled group, or to an employer that has actually withdrawn from the plan.

Notice Also Provided to Employers with Continued Withdrawal Liability Exposure

With respect to providing the notice to employers, the final regulation states that the notice must be provided to each employer that, as of the last day of the plan year to which the notice relates, is a party to a collective bargaining agreement pursuant to which the multiemployer plan is maintained. In addition, plans covering employees in the building and construction industry, entertainment industry, or trucking and household goods moving and public warehousing industries, must also provide notice to those employers who did not contribute during the year covered by the notice, but who may nonetheless have continued exposure to withdrawal liability under the special withdrawal liability rules that apply to those industries.

Content of the Funding Notice

The annual funding notice must include:

- ♦ Plan identifying information (the name of the plan, the address and phone number of the plan administrator, the plan sponsor's employer identification number, and the plan number);
- ♦ A statement as to whether the plan's funded current liability percentage for the plan year to which the notice relates is at least 100 percent (and, if not, the actual percentage);

- ◆ A statement of the market value of the plan's assets (and valuation date), the amount of benefit payments for the plan year, and the ratio of assets to benefit payments;
- ◆ A summary of the PBGC's rules regarding insolvent multiemployer plans, including the limitations on benefit payments and any potential benefit reductions and suspensions (and the potential effects of such limitations, reductions, and suspensions on the plan); and
- ◆ A general description of the benefits under the plan which are eligible to be guaranteed by the PBGC, along with an explanation of the limitations on the guarantee and the circumstances under which such limitations apply.
- ◆ Any additional information that the plan administrator elects to include, so long as it is necessary or helpful to understanding the information prescribed by the regulation.

Some Important Considerations

The annual funding notice should help employers contributing to multiemployer pension plans track the financial health of those plans. The financial condition of a multiemployer plan can be of critical importance in a wide array of circumstances. For example, the funding status of a plan that an employer contributes to can be especially important in the context of a corporate merger or acquisition. Employers should retain the annual funding notices they receive for future reference (these documents could, for example, be requested for due diligence purposes).

For further details and guidance regarding the funding notice requirements for multiemployer plans, please do not hesitate to contact your Seyfarth Shaw LLP attorney or contact any Employee Benefits attorney on the website at www.seyfarth.com.

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