Look Before You Leap:

How Calm Is the Water in a "Hybrid" Pool?

benefits
MAGAZINE

Reproduced with permission from *Benefits Magazine,* Volume 51, No. 6, June 2016, pages 24-29, published by the International Foundation of Employee Benefit Plans (www.ifebp.org), Brookfield, Wis. All rights reserved. Statements or opinions expressed in this article are those of the author and do not necessarily represent the views or positions of the International Foundation, its officers, directors or staff. No further transmission or electronic distribution of this material is permitted.

pdf/1215

To try to keep legacy employers contributing to a multiemployer pension plan and attract new employers, some funds are considering establishing hybrid withdrawal liability pools.

by | **Mark Casciari, Ronald J. Kramer, W. Andrew Douglass** and **Megan E. Troy**

Over the past 40 years, Congress has attempted to improve the funded status of multiemployer pension plans by enacting various laws, including the Employee Retirement Income Security Act of 1974 (ERISA),[1] the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)[2] and the Pension Protection Act of 2006 (PPA).[3] Despite these legislative changes, many multiemployer pension funds remain severely underfunded due to a variety of reasons, including employer outsourcing of union work, a changing regulatory environment, fiduciary breaches and investment losses from economic downturns including the Great Recession.

Employers that contribute to certain multiemployer plans face large liabilities from increased contribution obligations and dramatically increased potential withdrawal liability. Funds are faced with decreased participation with fewer contributing employers and active employees, and increased liabilities for future retirees.

learn more >>

Education

Trustees and Administrators Institutes
June 23-25, Las Vegas, Nevada

Visit *www.ifebp.org/trusteesadministrators* for more information.

From the Bookstore

2014 Pension Answer Book

Stephen J. Krass. Wolters Kluwer. 2014.
Visit *www.ifebp.org/books.asp?8982* for more details.

The Multiemployer Defined Benefit Pension Plan Landscape: A Ten-Year Look (2002-2011)

International Foundation and Horizon Actuarial Services, LLC. 2014.
Visit *www.ifebp.org/books.asp?7419E* for more details.

To help keep the multiemployer pension system afloat, some funds are thinking outside the box and making the transition to a new type of arrangement in a multiemployer plan that is referred to as a *hybrid withdrawal liability pool*.

What Is a Hybrid Pool?

A hybrid pool is the result of special Pension Benefit Guaranty Corporation (PBGC) approval of an alternative method of calculating withdrawal liability obtained by a multiemployer pension fund under ERISA Section 4211(c)(5).[4]

Instead of one withdrawal liability pool for all contributing employers, a hybrid plan has a second withdrawal liability pool. "New" participating employers, as well as "old" employers that opt to settle their legacy withdrawal liability as old employers and immediately rejoin the fund to become new employers, will be treated as being in a separate withdrawal liability pool going forward. Their "new pool" withdrawal liability, if triggered in the future, will not be calculated based on the underfundedness of the old employer withdrawal liability pool; instead, they will be subject to withdrawal liability based only on the new pool.

Regardless of the withdrawal liability calculation method used by the old pool,[5] the new pool employers usually are subject to the *direct attribution* method: If a new employer withdraws, its withdrawal liability is likely to be based on whether its own contributions, as invested, are sufficient to cover the vested benefits of its own employees. To the extent another new employer triggers withdrawal liability it cannot pay, that liability would be reallocated to the other new pool members. The funds that have adopted a hybrid plan say that they charge far more in contributions to new pool employers than is actuarially needed to satisfy the accruing benefits of their employees. So, barring severe financial losses, it is unlikely any new pool employer would be subject to much, if any, future withdrawal liability associated with the new pool.

While some talk about a new pool as a new pension fund, it is not. A fund adopting the hybrid method is still, at the end of the day, one single fund. While the fund might calculate and assess withdrawal liability differently for the two pools, the fund's assets and liabilities are still treated as one for all other purposes, including funding purposes. After all old employers exit the fund, the old pool assets and liability flow into the new pool for withdrawal liability calculation purposes. If a fund becomes insolvent, the participating employees would be impacted equally. Mass withdrawal still would be a fundwide, not pool-limited, event.

Employers often receive additional "benefits" by becoming "new" employers. First, to incentivize old employers to become new employers, a fund often will agree to a significant discount on the employer's legacy withdrawal liability assessment. The rehabilitation and funding improvement plans required by so-called critical and endangered funds usually have been amended to reduce or eliminate mandatory annual contribution increases for employers going into the new pool.[6]

Some funds also have modified their mass withdrawal liability provisions to assess reallocation liability based on the size of the employer's last withdrawal liability assessment as opposed to the level of the employer's contributions. Thus, while a "new" employer's contribution history might equate to 10% of the fund overall, if its withdrawal liability in a mass withdrawal situation was zero (as anticipated), its reallocation liability would be zero.

Becoming a new employer, however, does require a contractual com-

mitment. Funds usually require employers to agree to participate for a certain number of years and commit to participate at a certain minimum contribution level or suffer financial penalties. The terms of entry and ongoing participation in the hybrid pool will vary by fund and, often, by employer. Funds usually are willing to negotiate over contractual language, however, and try to address employer business concerns about becoming a new employer.

Funds present the hybrid method as a "win-win." New employers can participate in the fund without "buying" the current underfundedness that goes with it and insulate themselves from legacy withdrawal liability. Old employers concerned about contingent withdrawal liability that wish to participate in a multiemployer fund can "fix" their liability by withdrawing, paying it off and becoming a new employer. As for the fund, it has a method to retain employers that might otherwise withdraw completely and to attract new employers that would never consider buying into an underfunded plan.

Which Multiemployer Funds Are Adopting a Hybrid Pool?

Two of the most well-known plans that have adopted the hybrid method are the Central States Pension Plan and the New England Teamsters Pension Plan. Both received PBGC approval to use the hybrid method in 2011.

Central States has reported that 51 employers have or are in the process of becoming new employers and that the new pool is over 200% funded.[7] These employers have paid (or are paying) approximately $108 million in withdrawal liability.[8]

The New England Teamsters received significant new pool publicity when UPS agreed to become a new employer in 2012. UPS recorded a one-time charge of $896 million to be paid over the next 50 years to satisfy "old" legacy withdrawal liability.[9] UPS and the fund agreed that UPS would not be required to increase contributions for ten years.[10] As of 2012, approximately 20 other New England Teamsters employers have made similar moves.[11]

Another large fund that has applied for adoption of the hybrid model is the Bakery & Confectionery Union & Industry International Pension Fund. At last report, PBGC approval was pending.

What Are the Benefits From the Employer's Standpoint?

The first obvious benefit to participating in a hybrid model is that new employers have future withdrawal liability based on their new pool status under the direct attribution method.

Second, given a benefit structure in which new employers contribute more than the benefit the employee receives, there is only a limited possibility of new employer withdrawal liability under direct attribution withdrawal liability.

Third, an old employer that can afford to pay legacy withdrawal liability because it has resigned itself to having to pay withdrawal liability in the future—due to a cessation of the obligation to contribute, a potential asset sale or plan termination—can fix its liability at its current estimated assessment and negotiate a discounted settlement that it would not be able to negotiate in a typical withdrawal context.

Fourth, new employers in funds where new employers are not subject to mandatory contribution increases can better fix their ongoing contribution costs and save money versus old employers, whose contribution rates will continue to increase.

Fifth, new employers may have limited reallocation liability risks, as compared to old employers, to the extent their funds have adopted revised reallocation liability rules apportioning reallocation liability according to the size of the employer's last withdrawal. Assuming there is no withdrawal liability under the direct attribution method, there would be no reallocation liability.

Sixth, some employers may not, for labor relations reasons, be in a position to trigger a withdrawal in order to fix liability. The hybrid pool permits these employers to both fix liability and continue participation in the fund at the same level as before.

Seventh, plans have generally been flexible on negotiating language to address some employer business concerns.

What Are the Unknowns and Possible Cons From the Employer's Standpoint?

First and foremost, there are no guarantees of no future withdrawal liability, and funds cannot promise an employer otherwise. While being a new employer might reduce the risk, there still may be future liability. There are many critical status funds where withdrawal liability is calculated on a direct attribution basis. Investments can, and do, fail to live up to current

assumptions. Old pool liability could still be attributed to the new pool in the event of a mass withdrawal or if all old employers exit the fund.

Second, becoming a new employer does not protect the employer's participants from the effects of insolvency or, likely, from new legislation[12] that would permit underfunded funds to reduce vested benefits. If a fund becomes insolvent, for example, employees and retirees will see their benefits cut to no more than the PBGC maximum benefit (currently about $13,000 per year). An employer facing future benefit cuts for its employees might not be prepared to continue participation.

Third, even with the possible discounted assessment and the end to mandated contribution increases, the cost-benefit analysis might not justify moving to new employer status. Some employers might believe they will never trigger a withdrawal and the plan will never terminate. There is no reason to pay withdrawal liability that would never otherwise trigger. Alternatively, they may have determined that, to the extent they do withdraw, there would be nothing left within the controlled group to pay the liability anyway. Still other employers might decide that the value the employer can extract from the portion of the contributions that is not necessary to fund the benefit its employees receive exceeds the benefit of any discounted assessment.

Fourth, it is unclear whether there would be *redetermination liability*, i.e., liability of an old employer subject to the 20-year cap, for those that become a new employer.[13] The law provides that an employer that pays off its withdrawal liability is still subject to redetermination liability.[14] It is unclear how a fund or, more importantly, PBGC would treat a discounted settlement of withdrawal liability where the settlement is based on the fact that the employer is subject to the 20-year cap. To be sure, an old employer faces the same risk if it withdraws, but a withdrawn old employer also is not committing to ongoing fund participation for a period of years in return for a promise that it has settled its old liability.

Fifth, there are questions whether a fund—or PBGC, Congress or a reviewing court—might later undo a "deal" given to an employer that transitions to the new pool. Can the fund guarantee in perpe-

<< bios

Mark Casciari is a partner with Seyfarth Shaw LLP. He currently is a management co-chair of the Multiemployer Plan Withdrawal Liability Subcommittee of the ABA Labor Section Employee Benefits Committee. Casciari is a frequent speaker and writer on ERISA and employee benefits topics (e.g., www.erisa-employeebenefitslitigationblog.com). He is an adjunct professor of trial advocacy at the Northwestern University School of Law. Casciari holds a B.A. degree from the University of Southern California and a J.D. degree from Boston College Law School.

Ronald J. Kramer is a partner at Seyfarth Shaw representing management in a wide variety of labor and employment law matters. He has been responsible for advising and representing private and public sector employers and for employee benefits (ERISA) litigation matters including benefit claims and multiemployer withdrawal liability assessments. Kramer holds a B.A. degree from Michigan State University and a J.D. degree from Chicago-Kent College of Law, Illinois Institute of Technology.

W. Andrew Douglass is a partner in the Employee Benefits and Executive Compensation Department of Seyfarth Shaw. He has extensive experience with legal, financial and administrative issues that affect qualified retirement plans, health and welfare plans and other employee benefit arrangements. Douglass regularly advises on issues related to multiemployer plans, including demands for withdrawal liability and delinquent contributions. He holds a B.S. degree from Miami University and a J.D. degree from St. Louis University.

Megan E. Troy is an associate with Seyfarth Shaw. She focuses on representing management in the area of ERISA litigation and has represented employers in withdrawal liability assessments; pension, disability and retiree health care benefit claims; breach-of-fiduciary-duty claims; cash balance plan claims; and "stock drop" claims. Troy earned a B.A. degree from Denison University, a J.D. degree from Marquette University Law School and an LL.M. degree in taxation from Georgetown University Law Center.

tuity that new employer contribution rates will never increase, that reallocation liability calculations will always be favorable to new employers, that there will always be a new pool and that it will be subject to the direct allocation method? A fund creates the hybrid method by plan amendment, so couldn't it change its mind and eliminate the new pool in the future? Could PBGC withdraw its approval if it believes the hybrid method is being abused by the fund's board of trustees? What if Congress weighs in to modify or outlaw the option? Is the hybrid method completely safe from legal challenges by participants or old employers that are negatively impacted by fund deals with new employers? It is difficult to quantify these risks, even if they may be unlikely to materialize.

Sixth, becoming a new employer usually commits the employer to continued participation at a certain level for years. This commitment delays any possible future withdrawal, which may drag the employer into a mass withdrawal situation it otherwise might avoid with an immediate withdrawal. If a fund becomes insolvent or is allowed to reduce vested benefits, the employer might be forced to continue to contribute even though its employees receive far less benefits than anticipated.

Seventh, becoming a new employer might not look so good if Congress later adopts legislation that fixes the underfundedness problems of multiemployer funds.

What Should a Participating Employer Do?

There is no easy answer as to whether to dive into a new pool. There are many factors to be considered, which each employer should analyze independently. Each employer's situation is different, as is the situation of each fund. The terms of becoming a new employer will vary by fund and by employer as a result of negotiations. Becoming a new employer may make sense to some and be completely wrong for others. An employer should look before it leaps into a hybrid pool. It is imperative that any employer considering this option work carefully with experienced counsel, actuaries and other advisors to explore whether taking the plunge is truly worth it.

takeaways >>

- Instead of one withdrawal liability pool for all contributing employers, a hybrid plan has a second withdrawal liability pool.
- The withdrawal liability of a new pool employer is likely to be based on whether its own contributions cover the vested benefits of its own employees.
- A fund adopting the hybrid method is still one single fund. Mass withdrawal still would be fundwide and not limited to which pool an employer was in.
- Employers can withdraw from a fund, pay off their withdrawal liability and become a contributor to the new pool.

Endnotes

1. 29 U.S.C. §§1001-1371.
2. 29 U.S.C. §§1381-14611.
3. Pub. L. No. 109-280.
4. Under ERISA §4233, 29 U.S.C. §1413, PBGC may order the partition of a multiemployer plan if, among other things, partition would substantially reduce the likelihood that the plan will become insolvent. This article does not address §4233 preconditions to partition.
5. ERISA §4211 and the corresponding regulations allow a multiemployer fund four "pre-approved" allocation methods to compute withdrawal liability. Those methods are known as the presumptive method, the modified presumptive method, the rolling-5 method and the direct attribution method. See 29 CFR §§4211.32 through 4211.35.
6. See Central States, Southeast and Southwest Areas Pension Plan at p. 212 (available at https://mycentralstatespension.org/media/8476/pl_pension_plan_doc.pdf); Complete Rules and Regulations for the New England Teamsters & Trucking Industry Pension Plan at pp. 10-11, available at www.nettipf.com/pdf_files/Rules&Regulations.pdf.
7. See August 25, 2013 Quarterly Report of Independent Special Counsel at pp. 9-11, available at https://mycentralstatespension.org/media/26424/ex_ltr_isc_2013q1.pdf.
8. Id.
9. See August 24, 2012 press release, available at www.pressroom.ups.com/Press+Releases/Archive/2012/Q3/UPS,+Teamsters+to+Restructure+New+England+Pension+Plan.
10. Id.
11. See September 17, 2012 article "New England UPS Teamsters Approve Change" (available at http://tdu.org/news/new-england-ups-teamsters-approve-change).
12. See February 2013 National Coordinating Committee for Multiemployer Plans' report, "Solutions not Bailouts: A Comprehensive Plan from Business and Labor to Safeguard Multiemployer Retirement Security, Protect Taxpayers and Spur Economic Growth," available at www.nccmp.org/forEmails/SolutionsNotBailouts.pdf.
13. See ERISA §4219(c)(1)(D)(i).
14. See ERISA §4219(c)(4).