Bloomberg BNA

Pension & Benefits Reporter™

Reproduced with permission from Pension & Benefits Reporter, 41 BPR 216, 1/28/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

Outlook 2014

Multiemployer Plans in the Spotlight, But Congress May Broaden Retirement Focus

The sunset of Pension Protection Act multiemployer plan provisions at the end of 2014 could provide Congress and others with the impetus to finds ways to change the U.S. retirement system.

The PPA's sunset provisions have "created an opportunity for the Congress to revisit retirement security," Joshua Gotbaum, director of the Pension Benefit Guaranty Corporation, said in an interview Jan. 10. The discussion may be broader than just multiemployer plans, he said.

"Pensions are very complicated, and pension legislation, because it is complicated, always has to be bipartisan, bicameral and involves two congressional committees. So Congress does not make changes in pension law every other week, because it takes a period of time to develop to a serious consensus," Gotbaum said. With attention on multiemployer plans, "there are folks in the Congress who are taking advantage of the fact that there is going to be a discussion about pensions to think more broadly," he said.

This year also marks the 40th anniversary of the Employee Retirement Income Security Act, Gotbaum said. "We think it's important, always important, to assess, celebrate and act. We clearly have to celebrate what ERISA has done. ERISA has protected the retirements of tens of millions of people, but at the same time, we have to admit the need for changes," he said.

Among the areas that need changing is the multiemployer pension plan system, which needs strengthening, Gotbaum said. The PBGC "has an interest in preserving the multiemployer system because it protects 10 million people and their families and partly because if it collapses, PBGC will collapse, too," Gotbaum said.

Multiemployer Plans. Randy G. DeFrehn, executive director of the National Coordinating Committee for Multiemployer Plans in Washington, said in an interview Jan. 6 that action needs to be taken sooner rather than later to shore up the agency's multiemployer plan program.

"The main thing to keep in mind is that we have a federal agency on the brink of collapse," DeFrehn said. "Looking at the PBGC financials, their liabilities to assets are somewhere in the neighborhood of five to one," he said. "That's not sustainable long-term."

In the PBGC's fiscal year 2013 annual report, in which it said it had posted a record net deficit of $35.6 billion for the year (222 PBD, 11/18/13; 40 BPR 2654, 11/19/13), the agency reported that its multiemployer program had assets of $1.7 billion, compared with liabilities of $10 billion.

With attention on multiemployer plans, "there are folks in the Congress who are taking advantage of the fact that there is going to be a discussion about pensions to think more broadly."

—Joshua Gotbaum,
Pension Benefit Guaranty Corporation

"We have a couple of plans that are very large, that could really create a tsunami, a splash, for the entire community, if action isn't taken soon enough to keep the worst from happening to those plans," DeFrehn said.

While Gotbaum and DeFrehn consider it likely that Congress will renew the PPA's multiemployer plan provisions, both also said that the discussion will include more than just those provisions.

Legislation dealing with retirement issues will probably not be comprehensive, but will be done piece by piece, Brigen Winters, a principal at Groom Law Group Chartered in Washington, said Jan. 7. "Over the last couple years, there hasn't been a comprehensive budget deal that has set a pathway for tax reform. I think that's made it less likely that there will be a comprehensive retirement bill," Winters said.

The current situation "doesn't mean it's not possible" for Congress to incorporate several retirement system changes into one bill, Winters said. "For example, look at the PPA, which was a stand-alone pension bill that had both single and multiemployer defined benefit reforms, as well as pretty comprehensive defined contribution reforms, such as auto-enrollment incentives," he said.

Winters also said there is a push to deal with multiemployer plans. He said "there's a continuing dialogue with Congress and the administration, and that's a picture that everyone agrees with" that addressing multiemployer plans "is an urgent matter."

Other retirement system changes that have sparked interest include state pension plans offering their services to private employers, largely small businesses, and President Barack Obama's automatic payroll deposit individual retirement accounts proposal, origi-

nally included in his fiscal year 2011 budget, Gotbaum said.

Under the president's proposal, some employers would be required to offer an automatic IRA option, with contributions made through payroll deductions (20 PBD, 2/2/10; 37 BPR 299, 2/9/10).

PPA Renewals and Revisions. Title II of the PPA created a temporary set of rules, effective for plan years beginning in 2008 and ending in 2014, addressing the funding of multiemployer plans that are in ''endangered'' or ''critical'' status. The status of funds is also referred to as different colored ''zones''—green, yellow and red.

Green zone plans have a funded ratio of 80 percent or more and no projected funding deficiency. Yellow zone, or endangered, plans are those that are less than 80 percent funded, or either have or are projected to have by 2014 an accumulated funding deficiency. A plan is seriously endangered if it has both these conditions. Red zone, or critical, plans are those that are less than 65 percent funded at the beginning of the plan year, in addition to several other qualifications.

Endangered plans are required by the PPA to adopt and implement a funding improvement plan, and plans in critical status must adopt a rehabilitation plan.

DeFrehn said that Congress will likely renew the zone provisions, because most parties are accepting of them.

DeFrehn said that the NCCMP has been working with the House on developing a bill that would shore up multiemployer plans by giving them flexibility, new plan designs and a set of tools to address their problems. He said he expects a bill that includes the NCCMP's recommendations will be introduced this summer.

The Partnership for Multiemployer Retirement Security, a commission consisting of labor and business organizations, headed up by the NCCMP, detailed its suggestions in a report released Feb. 19, titled ''Solutions Not Bailouts'' (34 PBD, 2/20/13; 40 BPR 443, 2/26/13).

''We're cautiously optimistic that even though we've spent a long time on a comprehensive proposal for reform, we also recognize that anything you put into the congressional legislative process doesn't come back the way you originally sent it,'' DeFrehn said.

He said that he hopes that three elements, forming the core substance of the NCCMP proposal, will be included in whatever passes. The first element would help plans that have been able to weather the economic downturns of the past few years and to help others get back into good shape.

The recommendations under this element would provide additional security for the majority of plans that have successfully weathered the recent economic crises, for those that are on the path to recovery as measured against the objectives set forth in their funding improvement and/or rehabilitation plans and for plans that, with expanded access to tools provided in the PPA and subsequent legislation, would be able to reach their funding goals as required under the law, according to the report.

The second element would provide new designs and models for groups that have decided that either their risks or disclosures are too much for the employers to continue to handle, DeFrehn said.

The third element would provide some plans with flexibility and tools to help them survive, DeFrehn said. These are the plans that, ''for reasons that are beyond their control, not through mismanagement or benefit design, but as a result of the markets themselves'' or, in some cases, unintended consequences of nonpension legislation on particular plans, have been struggling to recover, he said.

The Pension Rights Center is generally supportive of the NCCMP's recommendations, but disagrees with one that would allow deeply troubled plans to have ''unbridled discretion to cut retirees' benefits,'' Karen Friedman, executive vice president and policy director at the PRC in Washington, said Jan. 7.

''If there's a vehicle for doing other legislative changes to retirement plans, it would be the multis.''

—Judy A. Miller,
American Society
Of Pension Professionals and Actuaries

According to the NCCMP report, plan trustees would be granted limited authority to take early corrective actions, including the partial suspension of accrued benefits for active and inactive vested participants, and the partial suspension of benefits for retirees in pay status.

The proposal is unnecessary because most of the troubled plans will not become insolvent for at least 10 to 20 years, Friedman said. ''We feel like there has to be an exploration of many other alternatives before retirees' benefit are considered to be cut,'' she said.

Many of the retirees would be dead by the time the plans become insolvent, but their benefits would be reduced to help their plans' future insolvency problems, Friedman said. ''There's a deep unfairness there. We also believe that this is a fundamental breach of the anti-cutback rule, which is an essential part of ERISA, perhaps the most sacred part of ERISA,'' she said.

''Whether there is an appetite for significant changes, or those provisions get extended with hopefully some technical corrections, or it all gets punted to the next Congress, it's hard to say,'' Judy A. Miller, director of retirement policy at the American Society of Pension Professionals and Actuaries in Arlington, Va., said Jan. 6. ''It may very well get punted to the next Congress.'' However, she said, ''if there's a vehicle for doing other legislative changes to retirement plans, it would be the multis.''

Gotbaum expressed some cautious optimism for congressional action this year. ''There's no one who knows how much the Congress will be able to do or not do this year. We don't know what is or is not possible. What we can tell you is that there is a broad recognition that concerns about retirement are widespread and felt by tens of millions of people,'' and Congress does try to act on concerns that impact so many people, he said.

PBGC Enforcement. One of the contentious issues the PBGC has faced in recent years is its enforcement of ERISA Section 4062(e). The PBGC has the authority under ERISA Section 4062(e) to require companies that sponsor single-employer plans and cease part of their operations to shore up those plans, such as by posting

 COPYRIGHT © 2014 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1069-5117

bonds or putting more money into them, Gotbaum said. In response to concerns from the business community, which said that the agency was using the authority even when there was no risk to either the company or the plan, the PBGC agreed, and instead focused its attention on only at-risk plans, Gotbaum said.

''What we said was, where a plan is very well funded, or the financial sponsor is financially solid, we're going to not step in and say you've got to do this or that to shore up your plan,'' Gotbaum said.

The PBGC went so far as to release companies from signed agreements that required the companies to put funds into their defined benefit plans even when the plans were financially sound, Gotbaum said.

Under Section 4062(e), if a company ceases operations at a facility that results in job losses for more than 20 percent of plan participants, the company is treated as though it is subject to withdrawal liability on the termination of single-employer plans under multiple controlled groups (ERISA sections 4063 and 4064).

''In 10 years, instead of being an issue that affects a small group of companies very intensely,'' ERISA Section 4062(e) enforcement ''will be an issue that affects a very broad group of companies very intensely.''

—KENT A. MASON, DAVIS & HARMAN

In a set of answers to frequently asked questions on an enforcement pilot program issued in November 2012, the PBGC said that it ''will generally take no action to enforce section 4062(e) liability against creditworthy companies or small plans and target its 4062(e) enforcement efforts to companies where the risk remains substantial.''

The PBGC's interpretation of the shutdown provisions is inconsistent with ERISA, because routine business transactions can trigger the 4062(e) liabilities, Kent A. Mason, a partner at Davis & Harman LLP in Washington, said Jan. 8. For example, he said, if a business owner has more than one business, and sells one, or consolidates two businesses from two sites to one site, then that will be considered a shutdown. In another situation, an owner may temporarily cease operations for repairs at a facility affected by a natural disaster, and that is also treated as a shutdown, Mason said. Mason works primarily with major employers, large plans and national vendors of retirement plan services.

For the companies that are affected by the 4062(e) enforcement measures, ''this is a huge issue, and if things are not changed, it will become one of the biggest issues we have,'' Mason said.

''In 10 years, instead of being an issue that affects a small group of companies very intensely, this will be an issue that affects a very broad group of companies very intensely,'' Mason said.

For example, Mason said, a company of 50,000 employees that froze its defined benefit plan 15 years ago may now have only 1,000 employees still active in the plan. ''So if I have a transaction affecting those 201 of those 1,000—which is a minuscule part of my business—I've got a big problem,'' he said.

The problem could be further exacerbated as the number of participants remaining in a plan gets smaller, he said. If only 100 participants are still in the plan, a shutdown affecting 21 employees could trigger the enforcement measures, he said. ''So you could be paying hundreds of millions of dollars because of a transaction affecting 21 employees out of 50,000,'' Mason said.

The business community is still expressing concerns regarding the 4062(e) rules to the PBGC, Mason said, but when asked whether he thinks the agency has been responding to those concerns, he said, ''No.''

Reportable Events. In April 2013, the PBGC reproposed a reportable events regulation that generally would expand the basis of granting reporting waivers to include not only the funded status of a sponsoring employer's defined benefit pension plan but also the financial soundness of the plan sponsor (64 PBD, 4/3/13; 40 BPR 869, 4/9/13). The rules would exempt most companies from reporting events that would not likely put their pension plans at risk. The proposed rules also include a financial soundness safe harbor, under which the agency would rely on commercial credit reporting companies to determine a company's creditworthiness.

The proposed rules were listed as being in the final rule stage in the agency's fall 2013 regulatory agenda, released in December (231 PBD, 12/3/13; 40 BPR 2801, 12/10/13).

''What we proposed in our reportable events regulation was that if we can get the information some other way without hassling you, if your financial circumstance is solid enough so that we don't think there's real risk, or your plan is sufficiently funded so that we don't think there's real risk, we're going to say that you don't have to report to us,'' Gotbaum said.

Miller, of ASPPA, said that her organization was pleased with the proposed rule, although it did have concerns about how the PBGC would determine how larger plans would have to qualify for the financial soundness exceptions.

Mason said that he worked with the American Benefits Council on a letter addressing the general issue of basing the PBGC rules on the financial soundness of a company, which said, among other things, that the financial soundness test is a ''threat'' to the PBGC.

''One very clear fact is often overlooked in analyses of threats to the PBGC,'' the ABC letter said. ''No healthy company has ever turned over liabilities to the PBGC. Only unhealthy companies pose a risk to the PBGC. So logically, PBGC's primary interest should be to help financially challenged companies recover so they do not have to turn over their obligations to the PBGC. While we appreciate that use of financial soundness as a trigger for additional burdens may appear logical on the surface, if applied in practice, it makes it more difficult for plan sponsors to recover and thus (1) increases the likelihood of liabilities being turned over to the PBGC and (2) is not in the best interests of plans or participants.''

ABC also argued in the letter that financial soundness tests have led to de-risking and will lead to more de-risking, and that by focusing burdens on the companies that are least able to afford the burdens, ''a financial soundness test has the adverse effects of hindering

companies' recovery, and severely hurting the plan system and PBGC.''

ABC also said in its letter that ''[i]t is inappropriate for PBGC, on behalf of the Federal government, to judge the financial soundness of companies.''

''There has been some suggestion that the proposed test is simply based on existing commercial measurements but the PBGC is proposing much different criteria,'' the letter said.

Gotbaum said that some commenters have argued that the PBGC should focus only on the plan, not on the company that sponsors the plan, ''and somehow by looking at the finances of the plan, you can tell whether the company will or will not go bankrupt.''

''The number one determinant why a plan comes to the PBGC is that their sponsoring company goes bankrupt,'' Gotbaum said. ''And so the idea that we should look only at the plan, and not the company that sponsors the plan, is a little silly.''

Miller said that the PBGC has indicated that it is taking all the comments it has received on the proposed rules seriously, and that ''substantial revisions'' might be made. ''What that means I don't know of course, but it's going to be a while, I think,'' she said.

Ultimately, ''if it is a good thing for us to use readily available business information to reduce burdens on business, I think we should do it,'' Gotbaum said.

Risk-Based Premiums. In budget documents released in April, President Obama proposed for the third year in a row to give the PBGC's board of directors authority to adjust pension insurance premiums and direct the agency to use a risk-based formula in setting premium prices (70 PBD, 4/11/13; 40 BPR 929, 4/16/13). That proposal has met with strong criticism, with some commenters saying that allowing the agency to set its own rates will drive businesses out of the pension system.

''It is very clear that claiming that raising PBGC premiums will cause companies to leave the defined benefit system has carried a lot of weight in Congress in the past. It is also clear that Congress has decided to raise PBGC premiums anyway,'' Gotbaum said.

However, Gotbaum said that the congressional premium increases don't look at the health of companies. ''The way Congress has set up PBGC's premiums, healthy companies are paying for the mistakes of other companies,'' Gotbaum said.

The most recent increase for single-employer plans was included in the end-of-the-year budget deal that Obama signed Dec. 26 (247 PBD, 12/27/13; 41 BPR 5, 1/7/14).

Premium-setting should be done on a more ''businesslike basis,'' Gotbaum said.

''We would much prefer that premiums be based on what businesses can afford, and based on the actuarial risk that PBGC is insuring. The reason we would like PBGC to set its own premiums is because we think we could do it in a way that would not drive companies out of the system,'' Gotbaum said.

Friedman, of the Pension Rights Center, said that the PRC is open to looking at the PBGC making recommendations as to what it thinks are appropriate rates in the single-employer context for basic rates, but is ''very much opposed'' to the agency coming up with a risk-based premium. ''Basically, the process where Congress is setting the rates works for the most part,'' Friedman said.

''We are strongly opposed to PBGC being authorized to set its own risk-based rates for many reasons,'' Mason said.

Hybrid Plan Proposals. If Congress does look broadly at retirement system issues, it may consider hybrid designs that combine aspects of defined benefit plans and defined contribution plans, those interviewed said.

One such proposal is the Universal, Secure and Adaptable (USA) Retirement Funds, which Sen. Tom Harkin (D-Iowa), chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, outlined in July 2012 (145 PBD, 7/30/12; 39 BPR 1437, 7/31/12). A bill on that proposal is expected to be introduced sometime soon, Friedman said.

"Basically, the process where Congress is setting the rates works for the most part."

—Karen Friedman, Pension Rights Center

Mason said he expects the bill to be introduced around the end of January or the beginning of February.

Although the bill hasn't been released yet, the versions of the proposal that the PRC has seen provide an ''interesting, creative way of expanding pension coverage, particularly for lower- and moderate-wage earners,'' Friedman said.

The privately administered retirement plans would take the burden and risk associated with running a defined benefit plan off of employers, Harkin said during a February 2013 event sponsored by the Center for American Progress Action Fund (30 PBD, 2/13/13; 40 BPR 409, 2/19/13). Because employers would not be responsible for managing the proposed retirement fund, they would be absolved of their fiduciary responsibility, he said. Unlike traditional pension plans, USA Retirement Funds could be subject to market fluctuations, such as an economic downturn, Harkin said. Because of this vulnerability, the funds would use ''conservative assumptions,'' which would make it more likely that full benefits would be paid, he said.

Winters, at Groom Law Group, said that he also expects the Harkin bill to be introduced sometime soon, and said, ''I can see him looking at that in conjunction with some of the multiemployer plan proposals.''

By Sean Forbes

To contact the reporter on this story: Sean Forbes in Washington at sforbes@bna.com

To contact the editor responsible for this story: Phil Kushin at pkushin@bna.com

 COPYRIGHT © 2014 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1069-5117