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Multi-employer pension plans are issuing Pension Protection Act funding notices and improvement schedules. Do you know your compliance bargaining options/strategies?

Bargaining Strategies in the Wake of Multiemployer Pension Plan Notices Issued Pursuant to the Pension Protection Act

By Dale L. Deitchler and Kevin L. Wright

Introduction: Zone Certification and Notice to Interested Parties

If you contribute to a multiemployer pension fund, the 415-page Pension Protection Act's ("PPA" or "the Act") provisions affecting multiemployer plans are now taking effect. The first of these provisions is the requirement that actuaries certify to the Internal Revenue Service into which funding zone (critical - red; endangered yellow; or no zone - green) the plan falls. Actuarial certification is not due until the 90th day of the plan year. For calendar year plans, that certification was due to be filed with the IRS on March 30, 2008. Within 30 days thereafter, plans must inform all interested parties - participants, beneficiaries, employers, local unions, the Pension Benefit Guaranty Corporation and the Secretary of Labor if the plan falls in the yellow or red zone.

Mandatory notices of yellow/red zone certification have already been issued for a number of funds and should continue to be issued, again depending on the scope of the plan year, throughout 2008. Even some "green" zone plans, at the same time, have taken the opportunity to voluntarily tout their status by notifying participating employers of the fund's good health.

For regional or national employers with multiple labor agreements, a yellow/red notice may have been accomplished by direct communication with the participating operating employer, likely to the payroll official responsible for remitting contributions to each respective fund, as the Act does not mandate notice to a specific employer representative. So, it would behoove centralized corporate labor and benefits representatives operating under one "control group" number for a fund to check with line payroll staff at each location contributing to a multiemployer pension fund to ensure an accounting of any issued notice or notices and/or to check with funds directly.

If the plan is in the yellow (endangered) or red (critical) zone, the trustees are required to put together a funding improvement plan (FIP) for yellow zone plans or a rehabilitation plan (RIP) for a red zone plan. These plans are to include benefit and contribution rate schedules to be delivered to the bargaining parties that are necessary to improve plan funding status showing revised benefit structures, revised contribution structures, or both. For calendar year plans in endangered or critical status in 2008, the FIP/RIP must be in place by November 25, 2008.

If the plan falls in the red zone, employers are required to begin contributing a 5% surcharge (over and above contractually mandated contributions), beginning 30 days after they receive notice of red zone status. This 5% surcharge is for 2008; the surcharge increases to 10% in 2009 (assuming a calendar year plan).

The surcharge has no "benefit bearing" advantage (i.e., it provides no enhanced benefit to employee participants whatsoever).

Bargaining Options for Compliance

Employers receiving funding notices from a "green" zone plan have no bargaining obligations. All other employers receiving funding notices must carefully review the notice, fund improvement plan schedules, and related labor agreements to determine bargaining obligations for compliance and identify the most advantageous approach. Employer obligations broadly depend on whether the plan is a yellow zone plan or red zone plan, as well as on contract status in two categories: (1) mid-term contracts; and (2) expiring contracts. Funds in endangered or critical status may not accept labor agreements that provide for a reduction in the level of contributions for any participants, a suspension of contributions with respect to any period of service, or any new direct or indirect exclusion of younger or newly hired employees from plan participation.

Mid-Term Contracts. Mid-term bargaining obligations only arise if at all with respect to red zone plans. Many funding notices and related correspondence may simply confirm mid-term contract contribution rates as compliant with fund RIP schedule percentage increases. The most recent contribution rate increase imposed by other contracts may have matched fund-mandated RIP scheduled percentage increases for 2008, but not for succeeding years of the contract, and so the bargaining parties will need to revisit PPA compliance prior to the next scheduled increase, or face surcharges. Many contracts, of course, will be identified as immediately out of compliance with fund-mandated increase, resulting in immediate surcharges to the employer. To confirm compliance or noncompliance as identified in these notices, a participating employer would need only to review labor agreement contribution rates and scheduled increases to ensure percentage increases matched those mandated by the Fund's FIP/RIP schedules.

With respect to critical status funds, for out of compliance mid-term contracts, there are two options: (1) within 30 days of notice of critical status, re-open, bargain and agree to the Fund's RIP schedule; or (2) do nothing and be subject to the 5% surcharge on contributions for 2008, increasing to a 10% surcharge in succeeding years. Some funds have indicated limited receptivity to accepting compliant negotiated adjustments beyond the 30-day period, but it is far from clear that, once the surcharge is imposed, the parties have any broad-based ability later to re-open to negotiate schedule-compliant labor agreement adjustments.

The decision whether to re-open involves a simple comparison between application of the applicable surcharges for the life of the contract (which do not compound but, rather, are based on contract-stated rates) and the percentage increases mandated under the fund's RIP schedule (which may or may not compound from year to year). It is likely that, for example, an employer participating in a fund with an RIP schedule with mandated 8% annual increases, compounded from year to year, will be better off economically in accepting the surcharges for the life of the existing contract.

Whether there is an obligation to re-open an out of compliance mid-term contract, "depends." Absent broad-based re-opener language, it is questionable whether employers have any obligation to bargain for the RIP schedules (or the ability to compel bargaining), rather than simply sit back and wait for imposition of the surcharge. Contract "zipper" clauses forgoing mid-term bargaining over covered bargaining subjects would also be relevant in analyzing whether there is a mid-term bargaining obligation as would the terms of fund participation agreements. Of course, re-opening brings its own risks, including the possibility of union claims that the contract's no-strike pledge no longer applies. Likewise, re-opening for economic advantage is also of questionable value, as no clear-cut right would exist to bargain to impasse and then implement.

The surcharge applies to any employer that has yet to negotiate benefit language consistent with one of the plan schedules, and it will remain in effect until the employer negotiates an agreement. Again, under the PPA, once the Fund issues its critical status letter, the bargaining parties have 30 days to submit a "compliant" collective bargaining agreement.

Expiring/Expired Contracts. Employer bargaining obligations with respect to expiring/expired contracts parallels to some extent those that apply with respect to mid-term contracts, except that those obligations apply to both yellow and red zone funds. As with mid-term contracts, at contract expiration, if the employer's most recent increase conforms on a percentage basis to a fund's improvement plan schedule, then an in-compliance window period will likely apply until the next scheduled increase. Similarly, if the last scheduled increase does not conform to the Fund's rehabilitation schedule, within 30 days of receipt of a plan's funding notice, the statutory surcharge will apply with respect to critical zone funds.

Unlike mid-term contracts, however, if the parties to an expiring contract do not adopt a fund's improvement plan within the earlier of a bargaining impasse certified by the Secretary of Labor or 180 days after contract expiration, a "default" schedule will apply, in addition to the critical status surcharge. The Act does not specify the process through which impasse certification would take place, nor is there any such provision under the National Labor Relations Act. We await further regulatory guidance on this process. Depending on the improvement plan schedule increases, the surcharge plus default schedule approach in bargaining, if successful, may be initially more costly, but over time may be more beneficial.

Default schedules when imposed may reduce or even eliminate entirely "adjustable benefits," which would include early retirement benefits, post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, and similar benefits. Because of potentially dire consequences flowing from imposition of any default schedule, unions are likely to view FIP/RIP schedule adoption as a "must

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have" term for a successor contract, and economic bargaining strategies must be adjusted accordingly.

Conclusion

Sorting the options for PPA compliance is not difficult once the legal landscape and the operative documents are carefully sifted. For one fund the likely best approach with respect to bargaining, critical zone funds and mid-term contracts can be reduced to a simple strategy: do nothing, and accept the surcharge. For open contracts with critical zone funds, the analysis may be more complex. As with many areas of labor and employee benefits law, the "devil is in the details." It is important that employers weigh all options and consult with experienced legal counsel as funding notices and improvement plans are received.

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