



High Noon for Multiemployer Pension Plans

By Bob Christenson (Atlanta)

Certain notice and funding provisions of the Pension Protection Act (PPA) became law January 1, 2008, and the first impact of these requirements is about to be felt. On or about March 30 most multiemployer pension plans will be sending status notices to employers and others. Many of these notices will contain bad news, although some will not. Here's what's going on in somewhat non-technical terms.

The PPA requires that each year, a multiemployer plan's actuary must certify to the plan sponsor, usually the board of trustees, whether or not the plan is in "endangered" or "critical" status. This certification must be made not later than the 90th day of the plan year – that's March 30, 2008 for calendar year plans.

Since March 30 falls on a Sunday and it is not clear whether the law allows an extension until the next business day, most actuaries will be certifying on Friday, March 28. In certain multiemployer plan circles, this day has already been labeled "Black Friday."

The endangered and critical labels are based on the degree of financial health enjoyed by the plan. Many multiemployer plans are going to end up falling under one or the other of these classifications. If this is the case, the plan sponsor has 30 days after the date of certification to notify participants, contributing employers, unions and various governmental agencies of the plan's status.

In the case of critical plans, the notice must also include an explanation that any adjustable benefits may be reduced for participants going into pay status after the notice. Plans which will not fall under one of these categories will probably be sending out gleeful notices to employers telling them how lucky they are.

Requirements for Endangered Plans

Endangered Plans must adopt and implement a "Funding Improvement Plan" which is actuarially designed to meet certain statutory funding improvement benchmarks during a period of time known as the "Funding Improvement Period." Generally, this Funding Improvement Period begins several years after the Funding Improvement Plan is adopted, and lasts either 10 or 15 years, depending on how bad the situation is.

Plans that are "seriously" endangered have more lenient benchmarks and are allowed the greater period of time to achieve them.

In the case of a calendar year plan, the sponsor has until November 25, 2008 to adopt a Funding Improvement Plan. The Plan will consist of the actions the sponsor intends to take to meet the required benchmarks, based on reasonable actuarial assumptions and reasonably anticipated experience. Most importantly from an employer's standpoint, the Plan must contain options calling for benefit cutbacks and/or increased contributions, which must be bargained with the union.

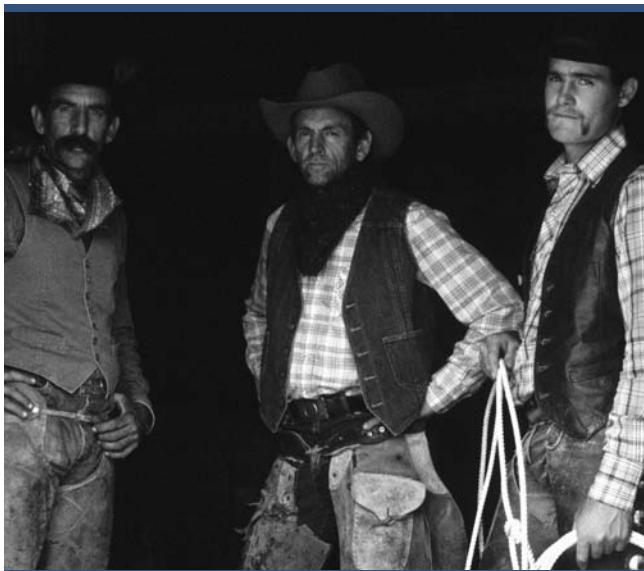
The plan sponsor is required to notify the bargaining parties of these options within 30 days of adoption of the Funding Improvement Plan. This notice will take the form of a series of proposed "schedules" based on

revised benefit formulas and revised contribution requirements. One schedule (called the "default" schedule) **must** be based on the maximum allowable reduction in future benefit accruals, although if the funding benchmarks cannot be met solely by cutting future benefits, then this schedule can require added contributions to make up the difference.

Another schedule **must** be based on achieving the benchmarks solely through added contributions, without cutting future benefits. The sponsor can also provide additional schedules which fall in the range between the two required schedules, meeting the benchmarks by various combinations of benefit cutbacks and contribution increases.

Upon the expiration of any collective bargaining agreement in effect while the plan is in Endangered Status (in other words, in effect on January 1, 2008), the bargaining parties must enter into an agreement which meets the requirements of the Funding Improvement Plan, by the earlier of 1) 180 days, or 2) a certification of impasse by the Secretary of Labor. Failure to agree within this period means that the default schedule goes into effect automatically.

Funding Improvement Plans and related contribution/benefit cut back schedules are updated every year to reflect actual plan experience. During the period in which a Funding Improvement Plan is being adopted, or after it goes into effect, the multiemployer plan is prohibited by law from accepting any collective bargaining agreement that provides for 1) reduced contributions for any participant; 2) a suspension of contributions for any



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period; or 3) any new direct or indirect exclusion of newly hired or younger employees from the plan.

The multiemployer plan is also barred from any amendment which increases plan liabilities, except those required to maintain qualified status or those otherwise required by law. Benefits can be increased only if the actuary certifies that the increase is being funded from contributions other than those required to meet the Funding Improvement Plan benchmarks.

An employer that fails to make a contribution required by a Funding Improvement Plan, or is late in making a payment, is subject to an excise tax penalty equal to 100% of the missed or late contribution. This is in addition to the usual liquidated damages, interest, fees and costs associated with delinquent contributions under ERISA.

Requirements for Critical Plans

Requirements for Critical Plans are much like those for Endangered Plans, except the "Funding Improvement Plan" is now called a "Rehabilitation Plan." The Rehabilitation Plan must be adopted no later than November 25, 2008, and must include the default and other schedules required of Endangered Plans. These schedules must be provided to the bargaining parties within 30 days of adoption of the Rehabilitation Plan.

For collective bargaining agreements in effect when the plan becomes critical, the bargaining parties must agree on provisions meeting the requirements of the Rehabilitation Plan by the earlier of 1) 180 days after expiration of the agreement, or 2) certification of impasse by the Secretary of Labor. If they fail to agree, the default schedule goes into effect automatically. Generally, the Rehabilitation Plan will be effective for 10 years (the "Rehabilitation Period"), beginning several years after the initial year of critical status.

During the Rehabilitation Plan's adoption period (which begins on the date the plan is certified as "critical" and ends on the day before the Rehabilitation Period goes into effect), the multiemployer plan cannot accept any collective bargaining agreement which provides 1) for reduced contributions for participants; 2) a suspension of contributions for any period; or 3) any new direct or indirect exclusion of new or younger employees from participation.

Similarly, the plan cannot be amended in any way that would increase liabilities, unless the amendment is required by law or required to maintain



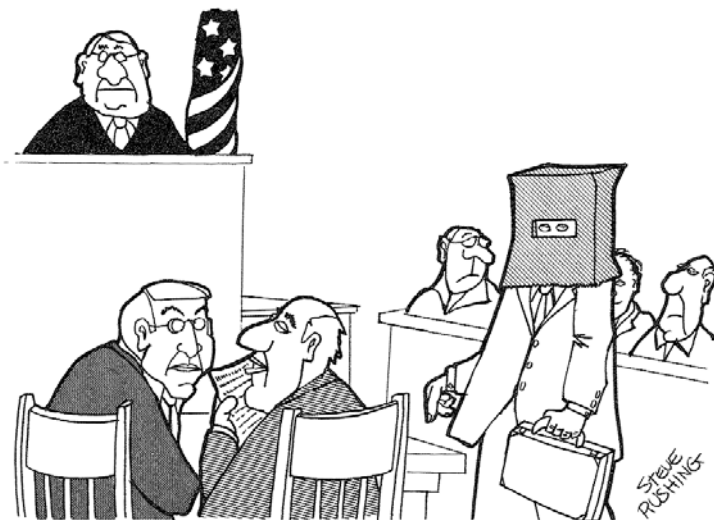
qualified status. After the Rehabilitation Plan is adopted, tight restrictions exist on increasing benefits.

But unlike the contribution obligations with respect to Endangered Plans, Critical Plans come with "Employer Surcharges." In 2008, a mandatory 5% contribution surcharge is imposed 30 days after the employer is notified that the plan is in critical status and that the surcharge is in effect. This surcharge is 10% for later years as long as the plan is in critical status.

The surcharge does not apply once the employer adopts a contribution schedule which meets the requirements of the Rehabilitation Plan. And if the employer already has a contribution schedule which meets Rehabilitation Plan requirements when the plan is declared Critical, then the surcharge is not imposed.

Failure to make required contributions or make required contributions on a timely basis, subjects the employer to a 100% excise tax and the usual ERISA penalties and assessments.

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