



# Construction Labor Report<sup>TM</sup>

Source: Construction Labor Report: All Issues > 2009 > 08/06/2009 > Lead Report > Pensions: Underfunded Multiemployer Plans Face Negotiation, Liability Withdrawal Issues

55 CLR 741

## ***Pensions***

### **Underfunded Multiemployer Plans Face Negotiation, Liability Withdrawal Issues**

Not only has the financial crisis that decimated world equity markets in 2008 and the first half of 2009 resulted in steep asset declines for multiemployer pension plans, but the crisis has made it increasingly difficult for employers to maintain their contribution obligations to such plans. Consequently, across all industries multiemployer plans have become significantly underfunded, thereby threatening the long-term viability of such plans.

In the struggle to deal with such plan underfunding, collective bargaining between contributing employers and unions has become difficult, as both employers and unions seek to protect their respective interests.

#### **Painful Bargaining Choices**

In some bargaining situations, the parties have agreed to allocate both employer pension and health plan contributions to cover pension plan obligations alone. In other cases, unions have agreed to sacrifice some or all of their employees' wage increases to maximize pension plan contributions.

Although some employers have sought to completely or partially stop contributing to defined benefit pension plans, such conduct may result in these employers being assessed withdrawal liability by the plans to fund the benefits of their employees. Although employers in the construction industry may be exempt from withdrawal liability under certain circumstances, use of such an exemption may ultimately hurt a plan's funding status.

Poorly funded multiemployer plans may be able to freeze their 2009 funding at the 2008 level, but not all multiemployer plans choose this option because of fears the plans will be even worse off after the freeze ends.

In interviews conducted in July, BNA asked how the market collapse has affected multiemployer plan funding in general, and how the funding deficiencies that have resulted have been handled during collective bargaining in the construction industry in particular.

Multiemployer defined benefit plans must meet different funding requirements than do single-employer defined benefit plans.<sup>1</sup>

---

<sup>1</sup> Although the funding rules for both types of plans were changed by the Pension Protection Act of 2006 (Pub. L. No. 109-280), the PPA added tax code Section 432 to address multiemployer plans in endangered status. Multiemployer plans are in endangered status if they have a funded percentage of less than 80 percent for a plan year (yellow zone). They are considered to be in critical status (red zone) if their funding percentage is less than 65 percent, and the sum of the market value of plan assets and the present value of anticipated employer contributions for the year and the next six years is less than the present value of nonforfeitable benefits for the year and the next six years. Plans that are adequately funded are considered to be in the green zone.

---

#### **Huge Jump in Underfunding Rates**

A survey of multiemployer plans conducted by the Segal Co. of calendar year plans' zone status shows that multiemployer plans across all industries are struggling to meet their funding obligations under the PPA as a result of the market collapse. In 2008, only 7 percent of plans surveyed were in the red zone, but that percentage has jumped to 32 percent in 2009.<sup>2</sup>

---

<sup>2</sup> The Segal survey also reports that in 2008, only 10 percent of plans were in the yellow zone, but 29 percent of plans surveyed in 2009 were in endangered status. Between 2008 and 2009, plans in the green zone dropped by approximately 44 percentage points, with 83 percent of plans falling in the green zone in 2008 but only 39 percent falling in the same zone in 2009. A summary of the Segal survey is available at <http://www.segalco.com/publications-and-resources/multiemployer-publications/surveys-studies/?id=1275>.

---

In addition, according to the Department of Labor's Employee Benefits Security Administration Web site, the agency has received notice of critical status from 102 plans and notice of endangered status from 136 plans, in which almost all the plans declared critical or endangered funding status for at least part of the 2008 plan year. <sup>3</sup>

---

<sup>3</sup> A full list of the critical and endangered status notices is available at <http://www.dol.gov/ebsa/criticalstatusnotices.html>.

---

Judith Mazo, senior vice president and director of research in the Segal Co.'s Washington D.C., office, told BNA July 24 that the financial losses encountered this past year have been larger than any encountered before and have demanded things of plans that never before have been demanded. The PPA has provided some cushioning from the shock of these losses under the funding rules, more so than would have been provided under the Employee Retirement Income Security Act, Mazo said.

The PPA obligates trustees and bargaining parties to identify and correct funding issues in a timely fashion so as to prevent further funding deterioration and to stabilize the financial condition of plans. Because of the PPA, "trustees have to face up to serious losses even if the losses do not show up in actuarial accounting for the current plan year, and they must notify participants about the funding problems and take action," Mazo said.

According to Mazo, acknowledging the funding problems and taking action sooner rather than later has been "uncomfortable" for a number of plans, particularly where trustees were not sure, at least at first, that the financial problems would be long-term.

Stan Goldfarb, an actuary with Horizon Actuarial Services LLC, Washington, D.C., told BNA July 27 that the PPA also causes some difficulty for multiemployer plans because of the shorter 15-year amortization period it imposes. Prior to the PPA's enactment, plans had a 20-year amortization schedule for unfunded liabilities under which they developed a common funding policy. Now, the majority of plans in the United States have a looming funding deficiency and the 20-year funding policy no longer works, Goldfarb said.

---

**The current economic crisis and downturn in construction activity means money is tight for contractors across the country, forcing many construction employers to freeze or lower compensation.**

***Denise S. Gold, Associated General Contractors Associate General Counsel***

---

Mitchel D. Whitehead, a partner at Seyfarth Shaw in Los Angeles, told BNA July 27 that the PPA's requirement for addressing funding deficiencies when they are identified serves to help multiemployer plans because it ensures that plans take steps to maintain their financial health. However, the requirement also has drawbacks since it can require plans to react in very immediate ways to funding problems that result from stock market volatility, he said.

#### **Funding Level Freeze**

This stock market volatility was one of the main reasons that the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) freeze option was implemented, Whitehead said.

At the end of 2008, Congress passed the law that permits multiemployer plan sponsors to temporarily freeze their plans' certified funding status at their 2008 levels, even if the actuarial certification of the plans' 2009 funding status shows the plans to be in critical status. <sup>4</sup>

---

<sup>4</sup> The Worker, Retiree, and Employer Recovery Act of 2008 (Pub. L. No. 110-458) was signed into law by President Bush Dec. 23, 2008.

---

---

According to the Segal survey, by the end of April 2009, 74 percent of plans that were eligible to freeze their status for 2009 at the 2008 level did so. The survey found that 68 percent (50 out of 73 plans) of red zone plans and 80 percent (52 out of 65 plans) of yellow zone plans have elected to freeze their funding levels, whereas only 29 percent of eligible plans (16 out of 55 plans) that were surveyed opted to remain in the red zone. The survey reported that the plans that opted to stay in the red zone did so because they could take advantage of a three-year extension under the WRERA to their funding improvement or rehabilitation period. The extension is available for plans in the yellow or red zones in 2008 or 2009.

Furthermore, according to a survey conducted in April 2009 by the International Foundation of Employee Benefit Plans (IFEBC), based in Brookfield, Wis., there are several reasons plans would or would not elect the freeze.

Based on the IFEBC survey results, the main reason plans are electing to freeze their funding status is because they are waiting to see if the market will rebound. The freeze also gives them more time to fix funding on their own terms rather than by the terms under the PPA.<sup>5</sup>

---

<sup>5</sup> A copy of the IFEBC survey is available for a fee at [http://www.nysna.org/images/pdfs/union/ppa\\_info/pension\\_funding\\_survey.pdf](http://www.nysna.org/images/pdfs/union/ppa_info/pension_funding_survey.pdf).

---

David Blumenstein, senior vice president and national market director for Segal in Washington, D.C., told BNA July 24 that deciding to freeze a plan's funding status does not get plans "off the hook" for dealing with funding problems. Rather, it gives the plans an additional year to apply the PPA tools for fixing funding problems, he said.

A recent arbitration demonstrates some of the issues multiemployer plan trustees face when confronted with a decision to freeze their plans.<sup>6</sup> The arbitrator said trustees for the plans could not elect the WRERA freeze. According to the arbitrator, it was important for the plans, which both had fallen from the green zone to the red zone and thus had to create rehabilitation plans under the terms of the PPA, to act quickly as opposed to extending the time to face their funding troubles. The arbitrator reasoned that without prompt action, the plans likely would face greater contributions and greater reductions in benefits if they did not immediately address their funding problems.

---

<sup>6</sup> *Employer Appointed Trustees of the Rocky Mountain UFCW and Employers Pension Plan and the Denver Area Meat Cutters and Employers Pension Plan v. Union Appointed Trustees of the Rocky Mountain UFCW and Employers Pension Plan and the Denver Area Meat Cutters and Employers Pension Plan*, FMCS Case No. 09-03051, Jaffe 2009.

---

The arbitrator agreed with employer-appointed trustees that without the tools provided under the PPA in regard to rehabilitation plans, including the ability to reduce or eliminate adjustable benefits, the trustees could not ensure that whatever action was taken during CBA negotiations would be sufficient to secure the long-term viability of the plans.

Whitehead said the arbitrator's decision depended on the specific financial circumstances of the plans and the timing of the expiration of the CBA. There is no "one size fits all" answer to the question of whether to elect the freeze, Whitehead said. However, the focus on the need to address financial considerations now instead of a year from now is a factor that is likely to be addressed by others considering whether to elect the freeze, he said.

### **Bargaining Adjustments**

Goldfarb said the pension funding crisis and the PPA's funding requirements are causing plan sponsors to adjust collective bargaining negotiations such that negotiated increases that normally would go toward compensation or to health care funds are being reallocated to the pension funds. This reallocation to pensions is causing other fringe benefit funds and wages to suffer because they are then losing money, he said.

Thomas Holsman, chief executive officer of Associated General Contractors of California, in Sacramento, Calif., told BNA July 9 that the emerging trend both in California as well as across the country in response to the market downturn's impact on multiemployer plan funding is that monetary increases to collective bargaining packages have been between 2.9 percent and 3.2 percent with the increases being allocated toward fringe benefits. Generally, 60 percent to as much as 100 percent of

the increases are going toward pension funds, he said. The remaining money, if any, is going toward health and welfare funds.

Holsman predicted that this shift toward pensions is likely to last several years, although the duration will depend on return on investments and jobs.

However, Randy DeFrehn, executive director of the National Coordinating Committee for Multiemployer Plans (NCCMP), Washington, D.C., told BNA July 30 that the reallocation of money from wages and health care funds could be threatened by the proposed health care reform. According to DeFrehn, if health care reform is passed with some of the more "onerous" features as proposed, it could mean tough times are ahead for bargaining. If the cost of health care rises because of reform, it will be difficult for bargaining parties to reallocate from health care funds to pension funds, he said. In that case, the only place left to go would be wages, he added.

DeFrehn said that some employer groups have already suggested that the only way some of the increased contribution requirements related to rehabilitation or funding improvement plans can be funded is from the existing wage package. "As one might expect, that has not been well-received and, as a practical matter, the only acceptable solution will be one that continues the notion of 'shared pain' that characterized the PPA," DeFrehn said.

He added that if an employee's take home pay is reduced too far, that employee will seek employment outside the system, especially if the additional contributions do not provide at least some additional benefit accruals for the employee.

### **Spotlight on Construction Industry**

While nearly all industries with multiemployer plans have been affected by the financial crisis, the construction industry has felt keenly the bursting of the housing bubble and the contraction in home mortgages.

Of plans that Segal surveyed in the construction industry, there was a rise of 19 percentage points between 2008 and 2009 of plans in the red zone. In 2008, only 5 percent of multiemployer plans in the construction industry were in the red zone. In 2009, 24 percent of plans are in the red zone. Between 2008 and 2009, construction industry plans in the yellow zone rose from 10 percent to 33 percent, while plans in the green zone fell from 85 percent to 43 percent.

The current economic crisis and downturn in construction activity means money is tight for contractors across the country, forcing many construction employers to freeze or lower compensation, Denise S. Gold, associate general counsel for the international Associated General Contractors organization, told BNA July 2.

In response, many multiemployer bargaining groups are asking for wage freezes this year, not only in bargaining over expiring agreements but, in some cases, also in previously negotiated increases scheduled to take effect this year. Gold agreed that negotiated increases are likely to be allocated to the pension funds, with no increase in workers' paychecks.

However, DeFrehn said that it is difficult to know the exact impact the underfunding problem is having on collective bargaining because so many plans have elected to freeze their funding status.

According to DeFrehn, the PPA has set the bar higher in terms of contributions to plans because there are certain benchmarks that must be met. However, the freeze allowed under the WRERA gives the plans and bargaining parties a year to assess their funding situations before having to adopt or modify funding improvement or rehabilitation plans as a result of the market declines. Because of this, many plans have not had to deal with bargaining issues as of yet, he said.

### **Construction Industry Examples**

BNA spoke with a number of participants in the construction industry who detailed how they are being affected.

- William J. Brennan, president of Associated General Contractors of Northwest Ohio, Toledo, Ohio, told BNA July 7 that the Glass & Glazing Employers Association of Toledo and Vicinity and the Painters and Allied Trades District Council No. 6 and Glaziers Local Union No. 948 recently reached a settlement during negotiations over their collective bargaining agreement, which expired at the end of June 2009.

According to Brennan, the negotiations included a \$0.25 increase in contributions for one year for health and pension funds. This increase was significantly less than the previous negotiated increase,

which was for \$1. Brennan added, though, that the union had to take an additional \$1.25 out of workers' wages to put into the benefit funds.

- Jack Ramage, executive director of the Master Builders' Association of Western Pennsylvania, in Pittsburgh, is an employee trustee on several multiemployer plans that were fully funded until the market crashed and are now either in endangered or critical funding status. He told BNA July 7 that these plans are taking steps to reduce benefits and increase funding by reallocating contribution increases to pension funds to the detriment of other fringe benefit funds, usually a savings or annuity plan.

Although the unions involved in the negotiations are agreeing to benefit cuts, Ramage said they are only agreeing to the least amount of reductions necessary as recommended by the funds' actuaries. He said he also has observed that the unions involved in negotiations seem to be reluctant to take money from the hourly wage package to fund the pension plans.

- Pittsburgh-based Cement Masons Local No 526, effective Dec. 1, 2009, will reallocate an additional \$1 per hour to their pension fund by reducing the contribution to the supplemental income fund and the savings and annuity fund, according to Ramage. He said no money is being taken from the base hourly wage rate.

However, because construction is still relatively strong in Pittsburgh, Ramage said some of the bargaining parties are not negotiating pension fund contributions specifically, but are negotiating monetary packages that leave allocations to the bargaining unions.

- The Greater Pennsylvania Regional Council of Carpenters negotiated a one-year contract with the employer associations for a \$1.50 per hour increase, all going to the pension plan, Ramage said.

- Despite the growing trend of reallocating wages and other fringe benefit monies to the pension fund, the reallocation has caused controversy in at least one instance. In Michigan, a disagreement over the reallocation of pension money prompted a six-week strike between the Laborers International Union Local 1075 and the Associated General Contractors Michigan Chapter.

The strike ended when the bargaining parties agreed that future increases required for pension contributions would come out of the negotiated wage package, with workers receiving a \$0.50 per hour wage increase in the first year of the contract's three-year term.

### **Withdrawal Liability**

Since 1980, when the Multiemployer Pension Plan Amendments Act was passed, multiemployer plans have been able to assess benefit liability on employers that withdraw fully or partially from a plan.<sup>7</sup>

---

<sup>7</sup> MPPAA, Pub. L. No. 96-364, created the withdrawal liability provisions, among other things.

MPPAA contains an exemption for employers in the building and construction industry. If such employers cease making contributions to pension plans on behalf of their employees, the employers are subject to withdrawal liability only if they continue to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or if they resume such work within five years after the date on which the obligation to contribute ended. If an employer withdraws from a multiemployer plan and does not resume work in the same jurisdiction, the plan and the remaining contributing construction employers will absorb the liability of a withdrawing employer.

According to Goldfarb, multiemployer funds are not generally harmed when construction employers go out of business, but instead are harmed when the amount of building and construction work shrinks.

The market collapse has led to a sharp decline of activity in the building and construction industry, leading many construction employers to withdraw from multiemployer funds and cease building activity in the same area served by members of the multiemployer fund, Goldfarb told BNA. In such cases, these employers are not subject to withdrawal liability, which threatens the long-term viability of the plans from which they withdrew, he said.

According to both Goldfarb and Mazo, if several construction employers leave a multiemployer plan without incurring withdrawal liability, that could mean a decline in contributions so that the plans could end up in the red zone and will have to comply with the PPA's requirements for emerging from critical status.

Furthermore, if a construction employer goes bankrupt, a multiemployer plan looking to collect from

the employer will be at a loss, Mazo said. The plan will not be able to collect money from the bankrupt employer nor will the plan have a claim in bankruptcy court because there is no official liability.

Goldfarb told BNA that for the first time, he is seeing multiemployer plans threaten to take legal action to collect withdrawal liability from construction employers. Many of these funds have never before had to take such legal actions to collect withdrawal liability, he said.

### **Merger Possibilities**

An alternative way for multiemployer plans to survive in the face of withdrawing construction employers is the merger of more stable multiemployer plans with weaker plans. Mazo said the merger of weaker and stronger plans is one option among many that the NCCMP is urging as a way to help save troubled multiemployer plans.

DeFrehn told BNA that such mergers could benefit all of the "stakeholders." Multiemployer plans and their participants will benefit from the mergers because there will more contributing employers (and thus a broader contribution base) and participants will not suffer a reduction in their benefits. From the taxpayers' perspective, such mergers can reduce the exposure to the Pension Benefit Guaranty Corporation posed by plans that might otherwise fail and end up on their doorstep, DeFrehn added.

The NCCMP proposes that, "where it makes sense," PBGC should facilitate these mergers by putting up money from the guarantee fund to bridge any shortfalls so that there are no fiduciary problems for the receiving plan, DeFrehn said.

### **More Legislation Needed**

While the WRERA freeze does offer some options to multiemployer pension funds to combat the funding crisis, those options are merely short-term fixes and do not provide direct relief from the challenges imposed by current funding requirements, Gold told BNA. Instead, additional legislation with more substantial changes is needed, he added.

To this end, AGC is working with a broad-based, labor-management group of multiemployer pension plan stakeholders coordinated by the NCCMP to develop the best solution to seek from Congress, Gold said.

DeFrehn said the NCCMP, which is working together with the Multiemployer Pension Plans Coalition on behalf of the multiemployer community, is trying to find relief in the funding rules that goes beyond simply having plans better funded by increasing contributions. DeFrehn said there is a necessary balance that must be maintained between the ability for employers to remain competitive and to avoid bankruptcy, and to provide employees with decent wages and benefits.

In June, two bills were introduced that addressed the funding problems faced by multiemployer plans.

The House Education and Labor Committee on June 24 approved the 401(k) Fair Disclosure and Pension Security Act of 2009 (H.R. 2989). Although the bill focuses on information about fees taken from workers' retirement accounts, Section 305 of the bill addresses multiemployer pension plan funding through a five-year automatic amortization extension period for multiemployer plans.

Also, on June 23, Rep. Earl Pomeroy (D-N.D.) released a discussion draft of various funding proposals to help defined benefit pension plans weather the economic storm. Pomeroy, a member of the House Ways and Means Committee, proposed funding relief for both single employer and multiemployer plans.

*By Meredith Z. Maresca*

---

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

ISSN 1523-5688

Copyright © 2009, The Bureau of National Affairs, Inc.. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy. <http://www.bna.com/corp/index.html#V>