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HOT TOPICS IN EMPLOYEE BENEFITS

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Agenda

- Observations on the Department of Labor (DOL)
- Dodd Frank Required Clawback Policies
- SECURE 2.0 Updates and 403(b) Determination Letters
- Special Financial Assistance Program and its Impact on Employers

Observations on the Department of Labor (DOL)

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Observations on the DOL in 2023

Challenges

- Proposed Secretary of Labor Julie Su faces opposition in the Senate
- Environmental, Social, and Governance (ESG) rule under judicial and congressional attack
- Aspects of fiduciary rule successfully challenged in court
- Heavy imposed workload from Secure 2.0
- Staffing and budget challenges

Impact

- Standstill on regulatory initiatives

Despite challenges, staff leadership is very engaged and creative, including on issues such as ESG, cryptocurrency, DOL and disclosure.

DOL Regulatory Priorities

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Priorities from DOL’s Annual Regulatory Agenda

- Fiduciary Rule
- More regulatory guidance on Pooled Employer Plans (PEPs)
- Form 5500 changes
- Changes to the Voluntary Fiduciary Correction Program (VFCP)
  - Seeking to simplify and expand the types of errors that can be corrected with VFCP
- Changes to prohibited transaction exemption process
  - And, separately, changes to the so-called QPAM exemption
- Improving the effectiveness of participant disclosures

DOL Enforcement Trends

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Enforcement Priorities – Established and Emerging

- Cybersecurity
- Emerging Issues
  - Defined benefit plan investments
  - Insurability

DOL Enforcement Trend: Cybersecurity

ERISA's duty of prudence and loyalty

Requires fiduciaries to act with prudence and diligence.

Has long been understood to include a duty to monitor service providers.

Breach event triggers claims of breach of fiduciary duty (often against both plan sponsor and vendor).

A common theory is that plan sponsor violated ERISA by failing to protect assets directly or by failing to monitor service provider.

Law is not settled regarding fiduciary duties.

DOL guidance is focused on monitoring of service providers.

Cybersecurity DOL Investigatory Initiative

What is the DOL asking about?

- Senior DOL official: "I don't think they would be surprised by the kinds of questions they would get from our investigators" based on the guidance.
- DOL requests have covered categories such as:
  - Policies and Procedures
  - Assessments and Audit Reports
  - Technical Controls and Practices
  - Insurance Coverage
  - Prior Cybersecurity Events and Responses

What can the DOL do? What is the risk?

- At a minimum, the DOL can subject plans to long (multi-year) and resource-taxing investigations.
- At worst, the DOL can make findings of fiduciary breach.
  - Although breach findings are more likely only if the DOL is investigating after a breach incident.
- But it is too early to predict where the DOL is going.

DOL Enforcement Trend: Defined Benefit Plan Investments

- Focus on Defined Benefit Investments
  - Not yet a formal DOL announcement as an examination initiative, but we are seeing this in current examinations of large defined benefit plans.
  - DOL is asking very detailed questions about defined benefit plan investments
    - Asking for all private fund documentation (disclosure documents, organizational documents, and subscription agreements)
    - Asking questions about specific provisions in those documents
  - This may be in response to the 2020 Supreme Court case, *Thole v. US Bank*
    - Court held that a DB plan participant does not have standing to sue a DB plan fiduciary for breach of fiduciary duty if the plan remains sufficiently funded and participant's promised benefit is not threatened by the alleged breach

DOL Enforcement Trend: Evidence of Insurability

- DOL Focus on Evidence of Insurability (EOI)
  - DOL announced a settlement in April with a large insurance company on the issue
  - DOL stated that other investigations have revealed similar practices at other insurance companies (suggesting a broader DOL initiative)
  - Issue arises when premiums are accepted before EOI is provided and approved
    - When beneficiary seeks to collect, insurer confirms EOI not met and denies claim
  - DOL contends that there may be a fiduciary duty under ERISA to determine eligibility at receipt of premiums
  - Implications for both insurers and plan sponsors, as settlement stated that employers may be liable for claims where these failures occur
  - Given these risks, employers may want to review their current collection practices

ESG Update

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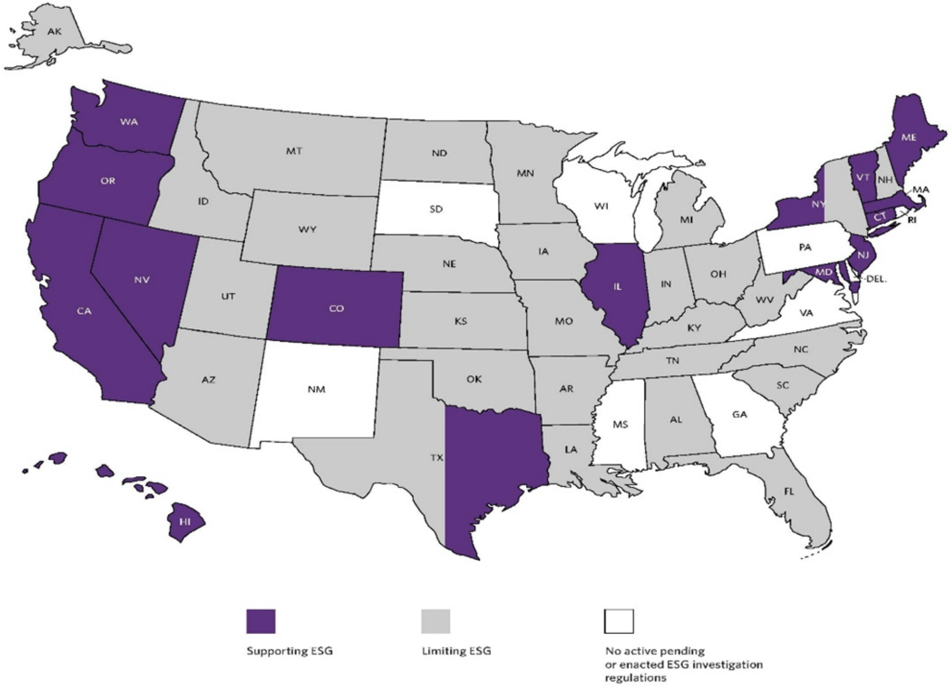
ESG and ERISA

- The use of ESG factors in investment decisionmaking can implicate ERISA's fiduciary duties.
- The key issue is how ESG factors fit within the fiduciary's obligation to act prudently and solely in the interest of plan participants.
- Does consideration of ESG factors in making investment decisions cause ERISA fiduciaries to violate:
  - *The Duty of Loyalty*: The duty to act for the exclusive purpose of providing benefits to participants and defraying reasonable expenses of administering the plan.
  - *The Duty of Prudence*: The duty to act with care, skill, prudence, and diligence under the circumstances then prevailing.

Key Takeaways from the Final ESG Rule

- A fiduciary CANNOT:
  - Subordinate the interests in retirement income or financial benefits under the plan to other objectives.
  - Sacrifice investment return or take on additional risk to promote benefits or goals unrelated to retirement income or financial benefits under the plan.
- A fiduciary CAN:
  - Give "appropriate consideration" to facts and circumstances "relevant" to the investment
  - Conduct a risk-return analysis for investments.
  - Consider factors that are relevant to the risk-return analysis, including "**the economic effects of climate change and other environmental, social or governance factors.**"

Anti-ESG Movement: Impact on DOL ESG Rule and ERISA



Anti-ESG Movement: Impact on DOL ESG Rule and ERISA (cont.)

- The DOL's ESG rule is under attack from multiple fronts.

Litigation	Congress	(Indirectly) States
• Two federal court cases challenging the DOL's authority to adopt the ESG final rule and seeking to stop its application—one suit brought by 25 state Attorneys General and one suit brought by 2 individual participants. • A lawsuit against American Airlines alleging breach of fiduciary duty in offering "ESG Funds" in 401(k) plan.	• Both the House and the Senate passed resolutions seeking to repeal the ESG final rule. President Biden used the first veto of his presidency to veto the repeal. • Republicans in the House have introduced a bill to amend ERISA to prohibit ERISA fiduciaries from considering ESG factors.	• Dozens of US states have adopted anti-ESG laws applicable to investments by state pension or other state investments. • State laws generally don't apply to private sector retirement plans because ERISA broadly "pre-empts" state law. • But this political movement in the states could find its way to the federal level.

Dodd Frank Required Clawback Policies

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The Long Road to Final Rule 10D-1

- ✓ **July 21, 2010 –** the Dodd-Frank Wall Street Reform and Consumer Protection Act became effective, which required the SEC to implement rules to direct exchanges to require listed companies to:
  - i. disclose the policy of the issuers for incentive-based compensation and
  - ii. implement a clawback policy to provide for recoupment of such compensation in the event of certain accounting restatements based on erroneous data
- ✓ **October 26, 2022 –**SEC issued final Rule 10D-1 (the "**Final Rule**") directing listing exchanges to adopt new listing standards (a rule that was initially proposed in 2015)
- ✓ **November 28, 2022 –** SEC's Final Rule was published in the Federal Register
- ✓ **March 13, 2023 –**NYSE and Nasdaq proposed clawback listing standards were published in the Federal Register
- ✓ **June 6, 2023 –**NYSE and Nasdaq amended their proposed listing standards with delayed effectiveness to October
- ✓ **June 9, 2023 –** SEC approved the amended NYSE and Nasdaq listing standards
- ❑ **October 2, 2023 –** effective date of rules
- ❑ **December 1, 2023 –** compliance date of rules

Timing and Transition

Action	Timing
Listing standards become effective	October 2, 2023
Companies must adopt a clawback policy	December 1, 2023
Companies must comply with the required clawback policy and recover all excess incentive-based compensation resulting from an accounting restatement	for any compensation received after October 2, 2023
Companies must comply with the new disclosures in proxy or information statements and Exchange Act annual reports	for all filings on or after October 2, 2023

Overview of Final Rule 10D-1 (and applicable exchange standards)

The Final Rule requires **each issuer** to develop and implement a **required policy** providing for the recovery, in the event of a **required accounting restatement**, of **incentive-based compensation** received by **current or former executive officers** during **the coverage period** when that compensation is based on the erroneously reported **financial information**.

Which Companies Are Covered by the Final Rule?

The Final Rule broadly applies to most listed companies, including:

- ✓ Emerging growth companies
- ✓ Smaller reporting companies
- ✓ Foreign private issuers
- ✓ Controlled companies
- ✓ Companies listing only debt and other non-equity securities

The Final Rule does not apply to:

- x Listed registered investment companies that have not awarded incentive-based compensation to any executive officers within the last three fiscal years
- x Unit investment trusts
- x Companies listing securities futures products and standardized options cleared by a clearing agency

What Is the Required Compensation Recovery Policy?

- A **compensation recovery policy** will be required
  - Commonly called a "clawback policy"
- Many listed companies have implemented clawback policies even absent a final rule, often in response to shareholder feedback
- Even listed companies that have voluntarily implemented clawback policies should revisit those policies, as the requirements of the Final Rule may be more onerous than current policy

Which Executives Are Covered by the Final Rule?

- Rule 10D-1 applies to any current or former **executive officer** of a covered company
  - Relies on a nearly identical definition as for Section 16 officers
  - Does not apply only to named executive officers that are the subject of compensation disclosure in the Company's annual proxy statement

- Any person who was an executive officer during the "performance period" is subject to clawback

- It applies to any compensation received after becoming an executive officer

Includes the current and former:

- president;
- principal financial officer;
- principal accounting officer or controller;
- any vice-president in charge of a principal business unit, division, or function; and
- any other officer who performs a significant policymaking function for the company, whether such person is or was employed by the company, the issuer's parent, or the issuer's subsidiary(ies)

What Types of Compensation Are Covered By the Final Rule?

Incentive-based Compensation

Any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure

Financial Reporting Measure

A measure determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, any measure derived wholly or in part from such a measure, and stock price and total shareholder return (TSR)

A financial reporting measure need not be presented within the financial statements or included in a filing with the SEC

Excess Compensation

The amount of erroneously awarded incentive-based compensation subject to recovery

Equals the amount received by an executive officer that exceeds the amount that otherwise would have been received had the incentive-based compensation been determined based on the accounting restatement

"Received" Compensation

Compensation is deemed "received" in the fiscal period during which the financial reporting measure specified in the incentive-based compensation award is attained, even if the payment or grant of the incentive-based compensation occurs after the end of that period

Incentive-Based Compensation Special Issue: Stock Price and TSR

- The inclusion of **stock price and TSR** within the definition of "financial reporting measures" raises significant challenges (administrative and financial) in determining what constitutes recoverable incentive-based compensation
  - Issuers would be permitted to use estimates to determine excess compensation in connection with incentive-based compensation tied to stock price or TSR in order to address the "confounding factors" that make it "difficult to establish the relationship between an accounting error and the stock price"
  - Estimates must be reasonable and the company must maintain documentation of the determination of the estimate and provide it to its exchange

Incentive Based Compensation Special Issue: Timing of Receipt

- Incentive-based compensation is deemed to be **received**, and therefore recoverable, in the fiscal period when the financial reporting measure specified in the incentive-based compensation award is attained
- The actual payment date does not matter

Type of Award	When Received
Equity award that vests upon satisfaction of a financial reporting measure and subsequent service	Deemed received in the fiscal period when the financial reporting measure is satisfied
Cash award earned upon satisfaction of a financial reporting measure	Deemed received in the fiscal period when the financial reporting measure is satisfied

➢ Because incentive-based compensation awards may have both service and performance conditions, an incentive award may be deemed to be "received" before payment is made

When Is the Final Rule Triggered?

- The Final Rule requires that the clawback policy adopted be triggered by both “Big R” and “little r” restatements.
  - The **three-year look-back period** starts on the earlier of (i) the date the company’s board of directors, committee and/or management concludes (or reasonably should have concluded) that a restatement is required, or (ii) the date a regulator, court or other legally authorized entity directs the company to restate previously issued financial statements.
- Application of the clawback policy will be triggered **before** the accounting restatement is actually filed.

What Is a Restatement?

- Under the Final Rule, clawback policies must mandate compensation recovery in the event a company is required to prepare an accounting **restatement** due to its material noncompliance with any financial reporting requirement under the securities laws
- The Final Rule applies to both “big R” and “little r” restatements
- “**Big R**” restatements correct **material** errors to previously issued financial statements and require companies to file an Item 4.02 Form 8-K and amend their filings promptly to restate the previously issued financial statements
- “**Little r**” restatements correct errors that are not material to previously issued financial statements, but would result in a material misstatement if (1) the errors were left uncorrected in the current filing or (2) the error correction was recognized in the current period. As such, this includes any corrections made when filing the prior year’s financial statements and generally does not require an Item 4.02 Form 8-K

Are There Any Exceptions to the Final Rule?

- There are three incredibly narrow exceptions to the requirements of the Final Rule:
  1. recovery is **impracticable** due to costs, determined following an initial attempt to collect,
  2. recovery would **violate a home-country law** adopted before the publication of Final Rule 10D-1 (provided such conclusion is based on an opinion of home-country counsel), and
  3. recovery need not extend to any compensation contributed to **tax-qualified plans.**
- Any determination must be made by an independent compensation committee
- Note that there is **no de minimis exception**, which the SEC said in its issuing release might carry the risk that such exemption would be being over- and under-inclusive.

Impracticability exception is very limited

The direct expense paid to a third party to assist in enforcing recovery would need to exceed the amount to be recovered

Before reaching the conclusion that recovery is "impracticable," a company must first "make a reasonable attempt to recover" the compensation, document its attempts, and provide the documentation to its exchange

May a Company Provide Indemnification to Executive Officers?

- The Final Rule **prohibits** a listed company from indemnifying or purchasing insurance for any executive officer or former executive officer against the loss of any erroneously awarded compensation
  - The SEC believes that such indemnification arrangements "fundamentally undermine the purpose of Section 10D"

- Executive officers could personally purchase **third-party insurance** (to the extent that such insurance is available) to fund potential recovery obligations
  - Listed companies are not permitted to pay, or reimburse the executive officer for, premiums

Reporting and Disclosure Obligations

- **New Annual Report Cover Page** must disclose by check boxes on the cover page whether the financial statements included in the filings reflected correction of an error and whether such error corrections are restatements that require a recovery analysis
- **New Disclosure Rules** (under Regulation S-K Item 402(w) or applicable forms for issuers who don't rely on Regulation S-K) will require companies to disclose "recovery" policies and actions taken to recover erroneously awarded executive compensation during or following the end of the most recently completed fiscal year, including a requirement to provide:
  - The date on which the listed issuer was required to prepare an accounting restatement and the aggregate dollar amount of erroneously awarded incentive-based compensation attributable to such accounting restatement;
  - The aggregate amount of incentive-based compensation that was erroneously awarded to all current and former named executive officers that remains outstanding at the end of the last completed fiscal year;

Reporting and Disclosure Obligations (cont.)

- Any outstanding amounts due from any current or former executive officer for 180 days or more, separately identified for each named executive officer (or, if the amount of such erroneously awarded incentive compensation has not yet been determined as of the time of the report, disclosure of this fact and an explanation of the reasons why); and
- If recovery would be impracticable, for each current and former named executive officer and for all other current and former executive officers as a group, the amount of recovery forgone and a brief description of the reason the listed registrant decided in each case not to pursue recovery.
  - Note that, if an amount is properly determined to be non-recoverable due to impracticality, such amount will not be considered to be outstanding at the last fiscal year for purposes of the disclosure requirements described above.

• **New Exhibit Filing:** the new rules will require the clawback policy to be filed as an exhibit to the annual report on Form 10-K, 20-F or 40-F

Consequences of Non-Compliance

- An issuer will be subject to **delisting** if it does not adopt and comply with its compensation recovery policy
- SEC enforcement interest

What Should Companies Do Now?

- Ensure that employment agreements, equity plans, deferred compensation plans, and bonus/incentive arrangements contain appropriate provisions to enable implementation of the Dodd-Frank recovery policies.
  - Create a contractual link between the incentive compensation and the recovery policy
  - Specify remedy for clawback (e.g., required to return stock distributed pursuant to equity grants)
- Consider whether to limit the company's policy to the Dodd Frank policy or to add other discretionary clawbacks such as:
  - Misconduct/breach of restrictive covenants
  - Clawback for broader group of responsible employees if the Dodd Frank clawback is triggered for executive officers
- We are seeing some companies implement multi-pronged clawback policies, with one prong of the policy designed to be a no-fault Dodd Frank-compliant policy and another prong for discretionary fault-based use, which is applicable to a broader population of employees.
  - This has the added benefit of needing only one cross reference in employment agreements and compensation arrangements
- Other companies may elect to implement only a Dodd Frank-compliant policy or maintain separate policies.
  - This has the added benefit of meaning that the misconduct policy is not publicly filed

What Should Companies Do Now? (cont.)

- Identify financial measures that may cause incentive compensation to become subject to recovery, and consider how the recovery process would work
  - This is especially important for stock price and TSR measures
- Consider a shift toward types of compensation that would not be covered by the clawback rules, such as:
  - Equity compensation that vests based on service
  - Incentive compensation using non-financial/non-stock price measures
  - Discretionary awards
- Consider imposing mandatory deferrals or holding requirements on earned incentive awards to facilitate implementation of the recovery policy
  - Deferral plans require plan design and navigation of complex legal requirements (including timing requirements for elections of deferral), so if it is preferrable to follow this approach, planning early will benefit the process

SECURE 2.0 Updates and 403(b) Determination Letters

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SECURE 2.0 Updates

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IRS Guidance Regarding Corrections

- IRS released Notice 2023-43 at the end of May
- Plan sponsors may correct "eligible inadvertent failures" under SECURE 2.0 and the Notice until EPCRS is updated (IRA custodians must wait for updates)
- Clarifies meaning of certain terms, including "reasonable period" for correction, "specific commitment" to correcting a failure, and "egregious" failures
- Confirms that most failures occurring before the December 29, 2022 SECURE 2.0 effective date can be corrected under expanded SECURE 2.0 correction rules (with some exceptions)

Rothification of Catch-Up Contributions - FAQs

- Can a plan require all employees to contribute on a Roth basis?
- Must a plan allow Roth contributions generally in order to allow for the Rothification of catch-up contributions?
- What are the options for a plan sponsor that does not want to allow Roth contributions?
- What happens if contributions originally contributed as catch-up must be reclassified (e.g., to pass ADP/ACP testing)?

Plan sponsors who have not already done so should coordinate with recordkeeper/third-party administrator and payroll ASAP to prepare for compliance with this requirement

Increased Dollar Limit for Small Sum Cashouts

- SECURE 2.0 increases the maximum amount that can be automatically cashed out from $5,000 to $7,000
  - As under the current rules, amounts of more than $1,000 but not exceeding $7,000 must be rolled over to an IRA unless the participant elects otherwise
- This provision is optional for all retirement plans and can apply to all distributions after December 31, 2023

<u>Plan sponsors who wish to adopt the increased small sum cashout limit for the earliest possible January 1, 2024 effective date may wish to coordinate with recordkeepers/third-party administrators to prepare for implementation and adoption</u>

Other SECURE 2.0 Changes Effective January 1, 2024

- Matching Contributions for Student Loan Payments (Optional)
- Emergency Savings Accounts (Optional)
- Penalty-Free Emergency Personal Expense Distributions (Optional)
- Penalty-Free Distributions for Domestic Abuse (Optional)
- Automatic Portability (Optional – distributions after December 29, 2023)
- Clarification of Periodic Payment Rule (Mandatory)
- Elimination of Pre-Death RMDs for Roth Amounts (Mandatory/Optional)
- Surviving Spouse Treated as Employee for RMDs (Optional)
- Excludible Employees for Top-Heavy Testing (Optional)
- Deadline Extension for Amendments Increasing Benefits (Optional)
- Collective Investment Trust investment by 403(b) Plans (Optional)
- Conforming hardship rules for 403(b) plans with respect to earnings, QNECs, QMACs (Optional)
- Family Attribution Rules (Mandatory)
- Starter 401(k) Plans (Optional)

Other Changes Effective January 1, 2024

- Don’t forget that the first group of long-term, part-time employees may become eligible to make deferrals under SECURE 1.0 requirements!
  - Employees with 500 hours or more of service in each of three consecutive years, starting with 2021
  - Employees will first become eligible under the SECURE 2.0 long-term, part-time employee rules January 1, 2025 (for 500 or more hours of service in each of two consecutive years)

403(b) Plan Determination Letters

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Availability of Determination Letters

- IRS window to submit requests for determination letter (Rev. Proc. 2022-40) on initial qualification for 403(b) plans is now open:

If the EIN of the plan sponsor ends in…	A determination letter application may be submitted beginning on:
1, 2, or 3	June 1, 2023
4, 5, 6, or 7	June 1, 2024
8, 9, or 0	June 1, 2025

- 403(b) Plans can also apply for initial determination letters upon plan termination
- New, revised versions of Form 5300 and 5310 have been created to reflect the ability of 403(b) plans to file

Determination Letter Program for 403(b) Plans (cont.)

- Generally good news for individually designed 403(b) plans, but before applying, plans may wish to consider the following:
  - Favorable determination letter provides helpful assurance that the form of the plan document satisfies the 403(b) requirements
  - Long-established 403(b) plans may have outdated or nonconforming plan provisions that may need to be corrected
  - The scope and details of the determination letter process and the requirements regarding the submission of historical plan documents is not yet clear (e.g., must documents be produced back to the original effective date of the plan, the effective date of the requirement for a written plan document (generally 2009), or something else)

Special Financial Assistance Program and Its Impact on Employers

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Pension Benefit Guaranty Corporation (PBGC) SFA Program Timeline

Mar. 11, 2021
American Rescue Plan was enacted

July 9, 2021
Interim Final Rule was issued

Dec. 21, 2021
First SFA application for the Local 138 Pension Trust Fund was approved

July 8, 2022
Final Rule was issued

Jan. 25, 2023
Exception process for withdrawal liability conditions added

24 Feb. 2023
PBGC OIG issued report re: SFA procedures

Mar. 11, 2023
Nonpriority plan application period began

Apr. 3, 2023
E-filing portal opened on a limited basis

The American Rescue Plan Act of 2021

- The American Rescue Plan Act of 2021 (ARPA) was enacted on March 11, 2021.
- Among other things, ARPA allows certain financially troubled multiemployer plans to apply for special financial assistance (SFA).
- Plans are not required to repay SFA, which is funded by general revenues from the US Treasury.
- SFA is administered by the PBGC.
- When an application is approved, the PBGC will make a single, lump-sum payment to the eligible multiemployer plan to enable the plan to pay benefits at plan levels.

The American Rescue Plan Act of 2021 (cont.)

- Prior to the enactment of the ARPA, PBGC’s Multiemployer Program was projected to become insolvent in FY 2026.
- Following implementation of the SFA Program, PBGC’s Multiemployer Program is projected to likely remain solvent through 2061.
- By the time the application process for SFA is over, the PBGC estimates that more than 200 plans covering more than 3 million participants and beneficiaries will receive nearly $95 billion in SFA.

SFA Eligibility

- To be eligible for SFA, a multiemployer plan must satisfy one of the following criteria:
  - The plan is in critical and declining status in any plan year beginning in 2020 through 2022.
  - A suspension of benefits has been approved for the plan under MPRA as of March 11, 2021.
  - In any plan year beginning in 2020 through 2022, the plan is in critical status, has a "modified funded percentage" (as defined by the law) of less than 40 percent, and has a ratio of active to inactive participants of less than 2:3.
  - The plan became insolvent after December 16, 2014, and has remained insolvent, and has not been terminated as of March 11, 2021.

SFA Priority Groups

- To keep from being overwhelmed with applications and to prioritize the most affected MEPP participants, the PBGC established Priority Groups for SFA applications

Priority Group	Plan Descriptions	Target Date Plans May Apply for SFA*
1	Already insolvent or projected to become insolvent before 3/11/2022	7/9/2021
2	Expected to be insolvent within one year of the date the plan's application is filed	12/27/2021
	Implemented MPRA benefit suspensions before 3/11/2021**	1/1/2022
3	Greater than 350,000 participants	4/1/2022
4	Projected to become insolvent before 3/11/2023	7/1/2022
5	Projected to become insolvent before 3/11/2026	2/11/2023
6	Present value of financial assistance in excess of $1 billion	2/11/2023

SFA Waiting List for Non-Priority Applicants

- The SFA application review process is extensive and must be completed within a short review timeframe (120 days within filing) therefore, PBGC is limited in the number of applications it can review at one time.
- PBGC does not have the capacity to accept new applications en masse.
- PBGC created a metering system for eligible non-priority plans.
- Plans are picked, in order, from the waiting list which was established on March 13, 2023. A plan has 7 calendar days to submit an application.
- In a separate process, applicants may submit a "lock-in application" to lock in base data in advance of submitting a complete application including the SFA measurement date, participant census data and non-SFA & SFA interest rate.

SFA Application Waiting List (cont.)

Waiting List Number	Name of Plan	EIN/PN	Date Email Request Received	Time Email Request Received
1	Laborers' International Union of North America Local Union No. 1822 Pension Fund	16-6147773/001	3/13/2023	9:00 AM
2	Teamsters Local 11's Pension Plan	22-6172223/001	3/13/2023	9:00 AM
3	UFCW Regional Pension Fund	16-6062287/074	3/13/2023	9:00 AM
4	IUE-CWA Pension Plan	22-6250252/001	3/13/2023	9:00 AM
5	Newspaper Guild International Pension Plan	52-1082662/001	3/13/2023	9:00 AM
6	CWA/ITU Negotiated Pension Plan	13-6212879/001	3/13/2023	9:00 AM
7	UFCW Northern California Employers Joint Pension Plan	94-6313554/001	3/13/2023	9:00 AM
8	Retirement Benefit Plan of the Newspaper and Magazine Drivers, Chauffeurs and Handlers Union Local 473	34-6514567/001	3/13/2023	9:00 AM
9	Retail Food Employers and UFCW Local 711 Pension Trust Fund	51-6031512/001	3/13/2023	9:00 AM
10	Central New York Laborers' Pension Plan	15-6016579/001	3/13/2023	9:00 AM
11	Teamsters Local Union No. 73 Pension Plan	51-0149915/001	3/13/2023	9:00 AM
12	Twin Cities Bakery Drivers Pension Fund	41-6172265/001	3/13/2023	9:00 AM
13	Employers' – Warehousemen's Pension Trust Fund	95-2238031/001	3/13/2023	9:00 AM
14	United Food and Commercial Workers Union Local 152 Retail Meat Pension Plan	23-6209656/001	3/13/2023	9:00 AM
15	Pacific Coast Shipyards Pension Fund	94-6128040/001	3/13/2023	9:00 AM

SFA Applications: By the Numbers (as of July 14, 2023)

- **23** applications under review
- **87** applications approved
  - 26 initial applications
  - 26 revised applications
  - 35 supplemented applications
- **1** denied application
- **71** withdrawn applications
- **108** lock-in applications
- **110** plans on the waiting list
  - 10 waiting list applications received

SFA Approved, So Far (as of July 14, 2023)

- PBGC has approved about $51 billion in SFA to date.
  - $49.3 billion in full (initial or revised) applications
  - $1.7 billion in supplemented applications

- Participants affected: 876,227

OIG Report: “PBGC Should Improve Its Special Financial Assistance Review Procedures”

- OIG faulted PBGC for failing to:
  - formally assess and document fraud risks,
  - sufficiently define risk tolerances,
  - establish review procedures for exceptions,
  - formalize final review procedures,
  - design a control that would ensure timely review of SFA applications, or
  - identify additional procedures that are needed as the priority group period ends.

PBGC Response to OIG Report

- In response to the OIG Report, the PBGC announced that it intended to complete the following steps:
- By June 2023:
  - conduct a formal fraud risk assessment to fully consider specific fraud risks the Corporation and program faces
  - refine its procedures to better document eligibility review procedures including those related to qualifying ratios
  - develop and add procedures for additional review of certain changed assumptions that impact SFA amount by a threshold percentage
  - document its procedures for reviewing the impact of inflation on administrative expenses and saving supporting documentation in the case file
  - develop and document procedures for management's final review of SFA applications (the concurrence package); and
  - review the control ensuring timely processing of applications and consider any changes needed
- By September 2023
  - develop and implement mitigation strategies for risks that require remediation
  - design specific procedures documenting the appropriate analysis and review that should be conducted on exceptions, outliers, and anomalies

PBGC'S Final Rule

- On July 8, 2022, PBGC published a final rule ("PBGC's Final Rule") regarding the implementation of the SFA program
- The PBGC's Final Rule was intended to make it easier for eligible plans to maintain solvency until 2051
  - **Solvency Projection Through 2051:** Amount of SFA is determined based on a solvency projection (e.g., the difference between plan obligations and plan resources, projected through 2051)
  - **Investment Return Assumptions:** Eligible plans may use different investment return assumptions for SFA assets and non-SFA assets
  - **Interest rates used to calculate SFA:** Projected contributions are based on rates bargained as of July 9, 2021
  - **Permissible investments for SFA assets:** Plans receiving SFA may invest up to 33% of SFA assets in return-seeking (e.g., equities and similar) investments (the remainder must be invested in investment-grade, fixed income securities)

PBGC'S Final Rule (cont.)

- The PBGC's Final Rule makes **significant changes to the applicable withdrawal liability rules** for plans that receive SFA.
- Plans that receive SFA must use a phase-in approach when including SFA assets in withdrawal liability calculations
  - For example, if a plan projects that SFA will last for 20 years, then 1/20 of the SFA amount will be included in the plan's assets for withdrawal liability purposes in each year over the 20-year period, starting with the year in which the plan receives the SFA
- Plans receiving SFA must use mass withdrawal liability discount rates when calculating withdrawal liability for at least 10 years, or until the plan no longer holds any SFA assets, if later
  - Recent increase in interest rates has made this rule less negatively impactful to employers than initially perceived
  - Funds applying for SFA can now, under a recent PBGC rule, request an exception to this rule

PBGC'S Final Rule (cont.)

- **Final Rule adds additional conditions**
- **Benefit Improvement Conditions**
  - In general, a plan cannot be amended to improve:
    - Past-service benefits other than a reinstatement or restoration of suspended benefits
    - Future-service benefits unless paid for by contribution increases not reflected in the plan's determination of SFA
  - However, past-service and future-service benefit improvements are permitted after ten years with PBGC approval if the plan can demonstrate that it will avoid insolvency
- **Death Audit**
  - A plan's application for SFA is required to include documentation of a death audit
  - Must be completed no earlier than 1 year before the plan's SFA measurement date

Potential Impact of SFA on Withdrawal Liability

- Impact on each particular fund that receives SFA will be different
- Largely dependent on interest rate fund currently uses for withdrawal liability and fund's current vs. post-SFA asset allocation
- Phase-in requirement significantly limits immediate beneficial impact of SFA on employer withdrawal liability, although some funds that receive SFA are expected to make a full recovery (i.e., reach 100% funded status eventually), potentially benefitting employers in very long run
- A fund's receipt of SFA *could* increase an employer's gross withdrawal liability
  - Lowering of the discount rate will generally increase employer withdrawal liability for withdrawals during the years in which the plan holds SFA assets
  - New required phase-in approach for the inclusion of SFA assets in withdrawal liability calculations may not offset the impact of the lower discount rate
- For employers whose withdrawal liability payments are limited by the 20-year payment cap, however, the "effective" withdrawal liability will likely remain the same (and will only change as the employer's contribution history and/or contribution rates change)

Potential Impact of SFA on Bargaining

- The current labor environment, lack of any material withdrawal liability relief for employers, and increased likelihood that SFA will allow eligible plans to remain solvent through at least 2051 make it increasingly likely that unions will start to ask for increases in pension contribution rates for the purpose of increasing employees' pension accruals
  - Prospective benefit improvements are permissible under the Final Rule if "new" contribution rate increases that are sufficient to pay for the improvement are adopted by the bargaining parties
- Unclear at this time what contribution rate increases will be required – if any – under a fund's rehabilitation plan going forward
  - Funds receiving SFA deemed to be in "critical status" until 2051, regardless of financial health

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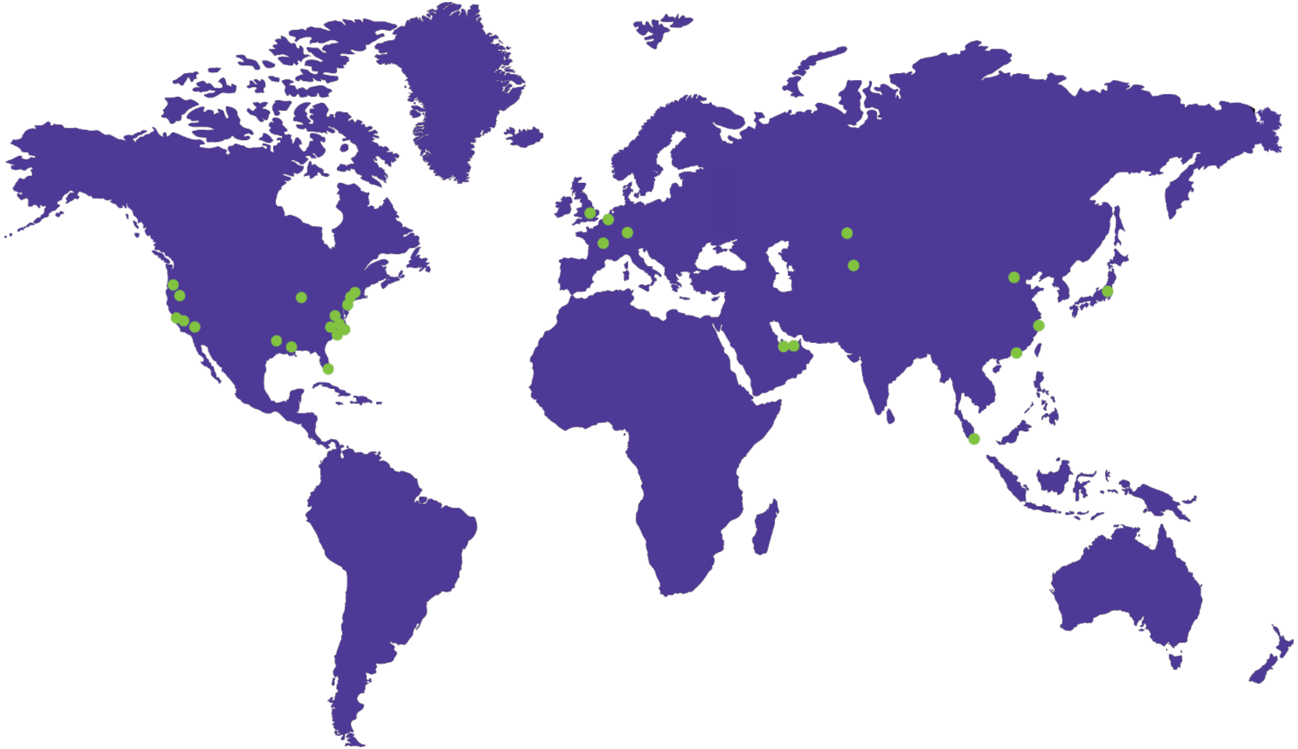

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