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Let's Talk - PBGC Pilot Mediation Project is Now Permanent

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The Pension Benefit Guaranty Corporation (the "PBGC") launched a Pilot Mediation Project in October 2017 to provide plan sponsors an opportunity to negotiate resolutions in Early Warning Program cases and in termination liability cases (see our prior [post](#)). Following its trial run, the PBGC announced last month that it would make the Mediation Program permanent, and also expanded its use to include fiduciary breach cases involving terminated plans.

The Mediation Program remains voluntary and available only for certain cases and eligible plan sponsors. Cases are generally ineligible for the program if: (1) the plan sponsor has a minimal ability to pay; (2) there is a pending court proceeding; or (3) there is limited time to act and the plan sponsor has declined to sign a standstill or tolling agreement.

Early Warning Program cases are those where a plan sponsor is involved in a corporate transaction that the PBGC thinks could affect the plan sponsor's ability to continue to support its pension plan. In an eligible case, the PBGC will inform the plan sponsor of the availability of mediation at the onset of negotiations and mediation will begin after the PBGC receives sufficient responses to its information requests. However, the transaction's timing will limit the window for mediation. The parties must complete mediation before the transaction closes and with sufficient time to document the resolution or for PBGC to institute legal action.

Termination liability cases are those that require a determination of the amount that a plan sponsor and its controlled group members must pay to the PBGC when a pension plan is terminated and transferred to the PBGC. Plan sponsors have 120 days after the plan's termination date is established to disclose required information about its controlled group's net worth. The PBGC will then make mediation available within a reasonable time after it reviews the information submitted by the plan sponsor.

Fiduciary breach cases are those that involve situations where fiduciaries of a terminated plan allegedly took actions that violated their fiduciary duties under ERISA. In these cases, the PBGC will include an option to mediate in its demand letters. Importantly, the Mediation Program only applies to fiduciary breach claims asserted by the PBGC with respect to terminated pension plans. It does not cover other fiduciary breach claims.

The Federal Mediation and Conciliation Service will continue to facilitate all mediations, with costs shared by the PBGC and the plan sponsor.

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