

New PBGC-Plan Sponsor Pilot Mediation Project for Early Warning Program and Termination Liability Cases

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The Pension Benefit Guaranty Corporation (the “PBGC”) launched a new [Pilot Mediation Project](#) to facilitate negotiations with (i) plan sponsors involved in corporate transactions under the purview of the PBGC’s [Early Warning Program](#) and (ii) the former plan sponsors of terminated pension plans that are subject to termination liability for the plans’ unfunded benefit liabilities.

The Pilot Mediation Project is voluntary and the PBGC will only offer it in certain cases. The PBGC stated that a case will generally not be eligible for the Pilot Mediation Project if (i) the plan sponsor has a minimal ability to pay, (ii) there is a pending court proceeding, or (iii) there is limited time to act and the plan sponsor has declined to sign a standstill or tolling agreement. If a case is selected for the Pilot Mediation Project and the plan sponsor agrees to mediation, the

Federal Mediation and Conciliation Service (the “FMCS”) will provide the mediator(s) pursuant to an interagency agreement between the FMCS and the PBGC. The PBGC has not released a copy of the agreement, and the specific procedural rules that would apply in this type of mediation are unclear. However, the PBGC noted that the parties to any mediation will be required to split its cost to avoid the appearance of partiality.

In termination liability cases under the Pilot Mediation Project, a plan sponsor would have 120 days to provide certain information about its controlled group’s net worth in accordance with 29 C.F.R. § 4062.6, which generally applies when a plan sponsor needs to demonstrate that its alleged termination liability exceeds 30% of its controlled group’s collective net worth (which in turn limits the PBGC’s ability to demand immediate payment of the full termination liability). The PBGC would then review the submitted information and make mediation available within a reasonable time after completing its review of the information.

In Early Warning Program cases under the Pilot Mediation Program, the PBGC would inform the plan sponsor about the availability of mediation at the outset of negotiations and mediation would begin after the PBGC receives sufficient responses to its information requests. However, the PBGC noted that a proposed transaction’s timing will determine the window for mediation and that mediation must be completed prior to the closing of the proposed transaction and with sufficient time for the parties to document the mediated resolution (or for the PBGC to take legal action, which presumably means the steps necessary to involuntarily terminate the plan(s) impacted by the transaction). Given that many Early Warning Program cases evolve quickly and that the PBGC often only becomes involved in the period between the signing of a definitive agreement and the closing of the transactions contemplated by the agreement, it is unclear whether the PBGC and plan sponsors will have sufficient time to mediate many Early Warning Program cases. With that said, the Pilot Mediation Program could hold some promise for plan sponsors that have sufficient time to complete the mediation process in such cases.

The PBGC stated that the Pilot Mediation Project will last for approximately one year. The PBGC will then evaluate its success based on certain metrics and presumably decide whether to make it permanent.

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