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3 Takeaways From The PBGC's Latest Fiscal Health Checkup

By **Kellie Mejdrich**

Law360 (August 4, 2023, 3:21 PM EDT) -- The Pension Benefit Guaranty Corp.'s program backstopping union pension plans will likely stay solvent for another 40 years because of a 2021 bailout, while the agency's insurance program for nonunion plans should be on solid footing for at least a decade, a new report showed. But experts say economic headwinds may cloud the PGBC's rosy outlook.

The PBGC's **annual report** on the projected fiscal health of insurance programs backstopping single-employer and multiemployer pension plans was released Wednesday and is required by the Employee Retirement Income Security Act.

The report confirmed a reversal of fortune for the multiemployer insurance program, thanks to Congress in 2021 approving what the PBGC now estimates will be $79.7 billion in rescue funds distributed to 211 underfunded union pension plans through the Special Financial Assistance Program. The SFA was tucked into a broader $1.9 trillion stimulus bill to recover from the coronavirus pandemic called the American Rescue Plan Act. That's projected to keep the multiemployer program solvent for the next 40 years, the report said, keeping retirement benefits secure for approximately 11.2 million working-class Americans and their families.

"Congress has, we hope, fixed the problem. But we will not know until we get close to the 30-year time horizon, on which the ARPA relief was premised, whether they actually have fixed the problem or whether there will need to be another rescue," said Israel Goldowitz, partner at the Wagner Law Group, who worked for more than 30 years at the PBGC before retiring to private practice.

Goldowitz added that "the public has a short memory. By that time, probably nobody will have much of a recollection of what went before, and we will have to deal with the crises of the day as they are then."

Here are three takeaways from attorneys on the PBGC's projections report for fiscal year 2022.

Potential Surplus Spurs Calls For Tax Breaks

The PBGC report's projection that the single employer insurance program could end up with a $63.6 billion surplus after 10 years spurred a major employee benefits industry group to call on Congress to lower companies' tax burden.

In its report, the PBGC describes the $63.6 billion figure as an average estimate for the net financial position — assets versus liabilities — for the single employer program in 2032. Like the multiemployer program, the single insurance program is funded by employers' insurance premiums. The PBGC said the actual net financial position of the fund as of September was higher than what the agency projected it would be in its fiscal year 2021 report. The PBGC said that was primarily due to "a decrease in liabilities resulting from rising interest rates that exceeded the decrease in assets due to rising interest rates and poor equity returns."

In a news release published shortly after the PBGC report release Wednesday, the ERISA Industry Committee said the multibillion-dollar projected surplus "should cause Congress to reexamine the premiums paid by companies that sponsor defined benefit pension plans." The group, also known as ERIC, is a lobbying group representing large employers administering ERISA-regulated welfare

benefit plans.

"PBGC's single-employer insurance program has been overfunded for years, yet the law provides for automatic annual premium increases, which impose expenses on retirement plan sponsors that are completely unnecessary," said Andy Banducci, senior vice president of retirement and compensation policy at ERIC, in a statement Wednesday.

"Current premium levels are clearly inflated and altogether unnecessary for PBGC's insurance program to be sustainable," Banducci said. "Any additional increases are unwarranted and will not provide additional benefits or protections for employees."

Democratic and Republican leaders of the tax-writing and labor committees in Congress — which are back home for an August recess — didn't return requests for comment. Even with the large surplus, the PBGC warned "existing underfunding is more acute in plans sponsored by companies with the highest risk of financial distress, and any downturn in the economy increases both underfunding and the probability of claims to PBGC."

Benefits attorneys said the large projected surplus — and the push from the employer lobbying group — wasn't surprising given that employers have broadly shifted their retirement benefits from defined benefit pension plans to defined contribution plans such as 401(k)s.

"They're projecting a huge surplus," said Faegre Drinker Biddle & Reath LLP partner Greg Ossi.

Ossi said single-employer defined benefit plans "are basically on their way to extinction," with cost pressures including the insurance premiums at issue pushing employers to shift retirement benefits away from pension benefits to the defined contribution model.

"The continued increase of premiums is another incentive for employers to say, 'let me freeze this defined benefit plan and move to a defined contribution plan, because it's becoming too expensive for me to continue to fund the plan,'" Ossi said.

"Notwithstanding the fact that interest rates are really helpful right now, because they're higher, which means you're going to have, typically, lower minimum funding requirements with higher interest rates," he added.

Unpredictable Multiemployer Risks Remain

Benefits attorneys contrasted the report's projections for the single-employer and multiemployer programs, and emphasized how many more unpredictable factors weigh on the union program's outcome.

Despite a 40-year solvency projection for the multiemployer program, the PBGC report warned of "a high degree of uncertainty, with the most pessimistic downside scenarios continuing to show a risk of insolvency in the mid-2030s." That means despite tens of billions of dollars backing up union pension programs through the SFA, the program might still end up in the red.

"Even the PBGC's report recognizes that the SFA was not a magic solution," said Sarah Bryan Fask, a shareholder at Littler Mendelson PC.

Fask said the success or failure of the multiemployer program was dependent on factors outside "any one employee or employer's control," including how funds invest, the returns they receive, total employer contributions, as well as what benefits the funds pay out. She also noted how the report's projections showed in 40% of scenarios, the multiemployer program will run out of funding within 40 years.

"If that turns out to be the case, many of today's workers will still be without a pension when it is their turn to retire. And, some of PBGC's scenarios project insolvency in as little as 12 years," Fask said.

PBGC's Limited Reach Shrinking

Attorneys highlighted how with a shift away from defined benefit plans and toward 401(k) plans, the PBGC report outlined projections for a secure retirement for a proportionally small subset of Americans overall.

The PBGC report estimates its single and multiemployer pension insurance programs cover approximately 33.5 million workers and retirees, with an estimated 22.3 million covered by the single-employer program and 11.2 million covered by the multiemployer program. Those figures contrast with the latest U.S. Census data showing 49% of adults aged 55 to 66 had no personal retirement savings.

John Harney, partner at O'Donoghue & O'Donoghue LLP, said pension programs insured by the multiemployer program covered "what is unfortunately, a very small sector of the American workforce."

"These are the folks who will have at least the opportunity to have a lifelong retirement benefit," Harney said.

He pointed out how the PBGC doesn't cover 401(k)s and other defined contribution plans.

"So people are kind of out there. And you know, they're only as good as the fiduciaries who have helped run the plan or the employers and the unions and the joint sponsors who create them," he said.

--Editing by Amy Rowe and Neil Cohen.

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