

Pension Plans Updated

Requirements For 'Endangered' And 'Critical' Plans Will Go Into Effect As Part Of Revisions To The Pension Protection Act

BY ROBERT CHRISTENSON
Fisher & Phillips LLP

Certain notice and funding provisions of the Pension Protection Act (PPA) became law January 1, 2008, and the first impact of these requirements is about to be felt. In late March, most multiemployer pension plans sent status notices to employers and others. Many of these notices contained bad news. Here's what's going on in somewhat non-technical terms.

The PPA requires that each year, a multiemployer plan's actuary must certify to the plan sponsor, usually the board of trustees, whether or not the plan is in "endangered" or "critical" status. This certification must be made not later than the 90th day of the plan year – that was

March 30, 2008 for calendar year plans.

Since March 30 fell on a Sunday and it is not clear whether the law allows an extension until the next business day, most actuaries certified on Friday, March 28. In certain multiemployer plan circles, this day had been labeled "Black Friday."

The endangered and critical labels are based on the degree of financial health enjoyed by the plan. Many multiemployer plans are going to end up falling under one or the other of these classifications. If this is the case, the plan sponsor has 30 days after the date of certification to notify participants, contributing employers, unions and various governmental agencies of the plan's status.

In the case of critical plans, the notice must also include an explanation that any

adjustable benefits may be reduced for participants going into pay status after the notice. Plans which will not fall under one of these categories will probably be sending out gleeful notices to employers telling them how lucky they are.

REQUIREMENTS FOR ENDANGERED PLANS

Endangered Plans must adopt and implement a "Funding Improvement Plan" which is actuarially designed to meet certain statutory funding improvement benchmarks during a period of time known as the "Funding Improvement Period." Generally, this Funding Improvement Period begins several years after the Funding Improvement Plan is adopted, and lasts either 10 or 15 years, depending

8A Certified



M.B.E. Certified
Illinois
Indiana
Wisconsin

architectural | ornamental | miscellaneous metals

design, fabrication & installation

phone (773)275.0700

fax(773)275.0900

www.chicagoarchitecturalmetals.com

on how bad the situation is. Plans that are “seriously” endangered have more lenient benchmarks and are allowed the greater period of time to achieve them.

In the case of a calendar year plan, the sponsor has until November 25, 2008 to adopt a Funding Improvement Plan. The Plan will consist of the actions the sponsor intends to take to meet the required benchmarks, based on reasonable actuarial assumptions and reasonably anticipated experience. Most importantly from an employer’s standpoint, the Plan must contain options calling for benefit cutbacks and/or increased contributions, which must be bargained with the union.

The plan sponsor is required to notify the bargaining parties of these options within 30 days of adoption of the Funding Improvement Plan. This notice will take the form of a series of proposed “schedules” based on revised benefit formulas and revised contribution requirements. One schedule (called the “default” schedule) must be based on the maximum allowable reduction in future benefit accruals, although if the funding benchmarks cannot be met solely by cutting future benefits, then this schedule can require added contributions to make up the difference.

Another schedule must be based on achieving the benchmarks solely through added contributions, without cutting future benefits. The sponsor can also provide additional schedules which fall in the range between the two required schedules, meeting the benchmarks by various combinations of benefit cutbacks and contribution increases.

Upon the expiration of any collective bargaining agreement in effect while the plan is in Endangered Status (in other words, in effect on January 1, 2008), the bargaining parties must enter into an agreement which meets the requirements of the Funding Improvement Plan, by the earlier of 1) 180 days, or 2) a certification of impasse by the Secretary of Labor. Failure to agree within this period means that the default schedule goes into effect automatically.

Funding Improvement Plans and related contribution/benefit cutback schedules are updated every year to reflect actual plan experience. During the period in which a Funding Improvement Plan is being adopted, or after it goes into effect, the multiemployer plan is prohibited by law from accepting any collective bargaining agreement that provides for:

- Reduced contributions for any participant
- A suspension of contributions for any period
- Any new direct or indirect exclusion of newly hired or younger employees from the plan

The multiemployer plan is also barred from any amendment which increases plan liabilities, except those required to maintain qualified status or those otherwise required by law. Benefits can be increased only if the actuary certifies that the increase is being funded from contributions other than those required to meet the Funding Improvement Plan benchmarks.

An employer that fails to make a contribution required by a Funding Improvement Plan, or is late in making a payment, is subject to an excise tax penalty equal to 100% of the missed or late contribution. This is in addition to

the usual liquidated damages, interest, fees and costs associated with delinquent contributions under ERISA.

REQUIREMENTS FOR CRITICAL PLANS

Requirements for Critical Plans are much like those for Endangered Plans, except the “Funding Improvement Plan” is now called a “Rehabilitation Plan.” The Rehabilitation Plan must be adopted no later than November 25, 2008, and must include the default and other schedules required of Endangered Plans. These schedules must be provided to the bargaining parties within 30 days of adoption of the Rehabilitation Plan.

For collective bargaining agreements in effect when the plan becomes critical, the bargaining parties must agree on provisions meeting the requirements of the Rehabilitation Plan by the earlier of

see PENSION, page 11

Want to build green and stay in the black?

For contractors, going green raises a lot of issues and concerns—new specs, achieving ratings, increased costs. It’s a different way of doing business.

Alberti Group has done the research and we know the facts. We can help you understand and manage the risks so you and your clients can go green and stay in the black.

Learn how now.

Contact Ujval Vyas at uvyas@albertigroup.net or call 312.810.1008.



Alberti Group

233 East Wacker Drive, Suite 3011, Chicago, IL

Member Milestones

Nine Builders Association members were honored as part of the Top 400 Contractors in the May 19 edition of Engineering News-Record magazine. [Clark Construction Group](#) was named as the 13th largest contractor, while [Opus North Corporation](#) (36th), [Pepper Construction Company](#) (45th), [Ryan Companies US, Inc.](#) (54th) and [James McHugh Construction Company](#) (88th) were also in the top 100. [McShane Construction Corporation](#) was listed 102nd, [W.E. O'Neil Construction Company](#) 112th, [Weis Builders](#) 149th and [Bulley & Andrews, LLC](#) at 294th.

Four Builders Association companies were honored with AGC Safety Awards for their commendable safety performance in 2007. [Valenti Builders, Inc.](#) won for its Zero Incidence Rate for companies with over 50,000 work hours, and [BABCO Construction](#), [Lawdensky Construction Company](#) and [The Lombard Company](#) were among companies with 10,000-50,000 work hours who displayed a Zero Incidence Rate.

[W.E. O'Neil Construction Company](#) announced that Michael J. Faron has been named Chairman and John A. Russell has been named President. Faron joined W.E. O'Neil in 1973 and had been President of the company since 1989. Russell joined the O'Neil team in 1982 and was promoted to Executive Vice President in 2005.

A new Ronald McDonald House near the University of Chicago Comer Children's Hospital was completed in February by [Bulley & Andrews'](#) Meyne division. The 30,000-square foot facility houses families whose children are being treated at the hospital. The new facility, a Victorian-style home, is close to twice the size of the original house.

[James McHugh Construction Company](#) completed a renova-



Faron



Russell



McShane

tion of Chicago's Blackstone Hotel in March. Renovations started in May of 2006 and called for most of the hotel to be gutted, while historic areas were restored on the skeleton of the building. The main lobby, Crystal Ballroom, Art Hall and lower level bar-bar shop were among the areas renovated in the Blackstone.

[McShane Construction Company](#) CEO James A. McShane was awarded the Richard G. Levy Presidents Award by the Chicago Chapter of the Society of Industrial & Office Realtors. The recipient is chosen based on accomplishments both in and out of the construction industry.

[Lombard Architectural Precast Products \(LAPPCO\)](#) manufactured the architectural precast concrete for Provena St. Joseph Medical Center in four months. The concrete work - which included custom formliners to create the look of modular brick, corner brick, jumbo brick and edge caps - was part of a sweeping renovation at the hospital. Part of that renovation is Will County's first Women's and Children's Center.

[Arnstein & Lehr](#) launched its new construction practice group in April. Attorneys in the Chicagoland area include: Matt Bryant; Barry Chatz; Mark Enright; Samuel Levine; Hal Morris; Dan Schlade; Mark Spognardi; Skip Starck; Paul Starkman; and Justin Weisberg.

PENSION, from page 9

1) 180 days after expiration of the agreement, or 2) certification of impasse by the Secretary of Labor. If they fail to agree the default schedule goes into effect automatically. Generally, the Rehabilitation Plan will be effective for 10 years (the "Rehabilitation Period"), beginning several years after the initial year of critical status.

During the Rehabilitation Plan's adoption period (which begins on the date the plan is certified as "critical" and ends on the day before the Rehabilitation Period goes into effect), the multiemployer plan cannot accept any collective bargaining agreement which provides:

- For reduced contributions for participants
- A suspension of contributions for any period
- Any new direct or indirect exclusion of new or younger employees from participation.

Similarly, the plan cannot be amended in any way that would increase liabilities, unless the amendment is required by law or required to maintain qualified status. After the Rehabilitation Plan is adopted, tight restrictions exist on increasing benefits.

But unlike the contribution obligations with respect to Endangered Plans, Critical Plans come with "Employer Surcharges." In 2008, a mandatory 5% contribution surcharge is imposed 30 days after the employer is notified that the plan is in critical status and that the surcharge is in effect. This surcharge is 10% for later years as long as the plan is in critical status.

The surcharge does not apply once the employer adopts a contribution schedule which meets the requirements of the Rehabilitation Plan. And if the employer already has a contribution schedule which meets Rehabilitation Plan requirements when the plan is declared Critical, then the surcharge is not imposed.

Failure to make required contributions or make required contributions on a timely basis, subjects the employer to a 100% excise tax and the usual ERISA penalties and assessments.

Robert Christenson, a partner at Fisher & Phillips LLP, is the chair of the firm's Employment Benefit Practice Group. The national firm represents management in areas of labor, employment and employee benefits.