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REPORT OF THE SUBCOMMITTEE ON
JOINTLY ADMINISTERED PLANS

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CHAPTER 16
JOINTLY ADMINISTERED PLANS

I. INTRODUCTION

II. SUBSTANTIVE REQUIREMENTS OF SECTION 302(C)(5) OF THE TAFT-HARTLEY ACT

A. Structure of Trust

1. Written Agreement

Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), permits payments to an employee benefit plan only where, among other things, the detailed basis on which such payments are to be made is set forth in a written agreement with the employer. The Section 302(c)(5) exception likewise requires that money paid to a trust fund be “for the sole and exclusive benefit of the employees [and their dependents] of such employer . . .” Whether an employer can be found to have adopted the terms of a written agreement by its conduct (“adoption of conduct”) absent a signed, written agreement remains an unsettled issue among the circuits.

In Line Construction Benefit Fund v. Allied Electrical Contractors, Inc., 591 F.3d 576 (7th Cir. 2010), the Line Construction Benefit Fund (“Lineco” or “Fund”) brought suit against Allied for delinquent contributions for the months of July, August and December 2006 and January and February 2007. It prevailed before the district court, and the Company appealed.

Allied began making payments in 1993 to provide benefits to employees represented by the Union. In 2005, NECA and the Union entered into a collective bargaining agreement (“CBA” or “Agreement”) which, among other things, specified that the hourly contribution rate to the Fund be increased from $4.50 per hour to $4.75 per hour. The CBA also stated that it would be applicable to all companies who signed a letter of consent to be bound by the terms of the Agreement. In keeping with the 2005 CBA, Allied began making contributions at $4.75 per hour. In October 2006, the Union barred Allied’s president from a NECA-Union negotiating session because Allied had not signed a letter of consent under the CBA. In December 2006, Allied executed a form letter of consent. Nevertheless, Allied failed to make its contributions for December 2006, January 2007 and February 2007. In March 2007, Allied resumed payments as required by the CBA.

On appeal, Allied acknowledged that it was required to make contributions after it signed the letter of assent, but argued that it had not been required to do so before then. The Court of Appeals rejected that argument, noting that an actual signature was unnecessary, and further holding that “[a]ssent can also be established through other evidence, including most importantly, conduct manifesting agreement, such as the payment of union wages, remission of union dues, the payment of fringe benefit contributions, the existence of other agreements evidencing assent . . .” Id. at 580.
Allied also pointed out that the Union had barred it from the negotiating table, thereby demonstrating – in Allied’s view – that the Union had concluded that Allied was not bound by the labor agreement at that time. The Court of Appeals dismissed that interpretation, finding instead that Allied’s desire to be at the negotiating table indicated that it recognized its interest in the CBA, and perhaps even assumed it was party through its NECA membership. Allied further argued that the CBA’s requirement of a letter of assent from the Union should preclude the Court from holding that it had been bound by the Agreement until the Union issued such a letter. The Court found the Company’s approach overly formalistic and held that, as a matter of policy, such an approach would – if adopted – create a loophole for parties seeking to escape responsibilities that they have acknowledged through their behavior. Finally, the Court rejected Allied’s argument that 29 U.S.C. §186(c)(5)(B) required a signed agreement before it could have owed contributions, reaffirming its previously articulated position that as long as the agreement was written “it does not have to be a ‘signed, unexpired collective bargaining agreement between the parties.’” 591 F.3d at 581.

In Empire State Carpenters Welfare Annuity v. Conway Contribution of Itheca, Inc, 2010 WL 625352 (EDNY, February 19, 2010), the plan sought contributions pursuant to the 2001 CBA for the period May 1, 2003 through April 30, 2006. There was no dispute that Conway had never signed the 2001 agreement. Conway argued that it was therefore not obliged to make the disputed contributions. The Court rejected the Company’s argument because Conway (1) had paid the contractually agreed-upon hourly wages to, and hourly fringe benefit contributions on behalf of, its carpenters as set forth in the 2001 CBA; (2) submitted to the Funds, on behalf of its carpenter employees, in addition to the fringe benefit contributions, remittance forms that stated that “[a]ny signatory to this form is hereby bound to any and all applicable collective bargaining agreements with the [Union] . . . and is hereby bound to any Fund’s documents, trust agreements, or other similar documents;” and (3) the remittance forms had been signed by the President of the Company. Conway’s reliance on the Union’s efforts to discipline a union member for working for Conway because the Company was a non-signatory contractor as evidence that it was not bound by the 2001 CBA was rejected. The Court accepted, instead, the Union’s explanation that Conway was a non-signatory contractor that was nevertheless bound by the terms of the 2001 CBA.

On the other hand, Conway’s letter to the Union in January 2003 terminating its obligations under the 2001 CBA, which had been scheduled to end on April 30, 2006, was not as easily disregarded. Although the 2001 CBA’s termination date was April 30, 2006, the CBA also provided that either party could terminate it earlier by giving “written notice of intent to seek change or to amend the provisions of this Agreement . . . at least 90 days prior to the expiration date.” Id. at *8. The Court found the language to be ambiguous, possibly allowing earlier termination of the entire labor agreement by the Company as long as notice was given at least 90 days before April 30, 2006. See also, Trustees of the Ohio Bricklayers Pension Fund v. Angelo’s Caulking & Sealant, Inc., 2010 WL 2465331 (S.D. Ohio, June 14, 2010)(the Union’s negotiation of CBA with the Mason Contractors Association, requiring that masonry contractors contribute to the pension fund, did not bind the defendant company where there was no evidence that defendant ever assigned its collective bargaining rights to the Contractor Association).

The case of Bd of Trustees of the Plumbers Local Union v. Encotech Const Serv., 2010 WL 1994472 (N.D. Ill, May 14, 2010), arose out of a 2001 Subscription Agreement entered into
by Encotech and the Union, whereby the Company agreed to be bound by the terms of the CBA between the Union and the plumbing and heating contractors association, which was subsequently renewed on June 1, 2005 with an expiration date of May 31, 2008. Encotech made contribution payments under the CBA, and then made no payments from January 2005 to March 2007. Seeking recovery of those delinquent contributions, the Fund filed suit. In May 2007, Encotech and its president entered into a Settlement Agreement that obligated the Company to submit contribution reports and make monthly payments on the unpaid contributions. Under the terms of the Settlement Agreement, in the event of the company’s default, the Company’s president agreed to be individually liable for all the obligations of Encotech under the terms of the CBA. The Company ultimately not only ceased paying contributions, but also stopped employing Union members as well.

The Fund thereafter revived its earlier lawsuit, asserting claims against both Encotech and its president for both the amounts remaining to be paid under the Settlement Agreement and the more recent unpaid contributions. The defendants argued that they owed nothing under the CBA because the Subscription Agreement ended on May 31, 2002, while the CBA under which the contributions were allegedly owed was in effect from June 1, 2005 to May 31, 2008. This contention was rejected in light of the fact that Encotech had submitted monthly contribution reports after June 1, 2005, which expressly provided that the employer was “bound by the terms of the current collective bargaining agreement.” Moreover, it had signed the Settlement Agreement, which specifically stated that Encotech was obliged to follow the terms of the 2005 CBA. Finally, the Company behaved in a manner that was consistent with the implied adoption of the CBA, such as continuing to employ Union members, submitting monthly contribution reports, and reporting the number of hours worked by covered employees.

Encotech’s president likewise attempted to avoid being found personally liable under the Settlement Agreement. Initially, she argued that she had signed the Agreement under economic duress. But the Court found, as a matter of law, that signing an Agreement due to the pressure of financial circumstances or a difficult bargaining situation is insufficient to invalidate the contract. Her argument that the Agreement was unconscionable was also rejected; the Court held that “the mere fact that one party to a contract enjoyed little relative bargaining strength cannot alone render a contractual provision unenforceable.” Id. at *8

2. **Annual Audit Requirement**

3. **Joint Administration**

LMRA § 302(c)(5) generally requires, among other things, that an equal number of union-appointed and employer-appointed Trustees be assigned to the Board of an employee benefit fund. This is not, however, the only LMRA provision under which such an appointment can occur. A recent example of another 302(c) exemption that may serve as a basis for appointment of trustees is found in *Sheick v. Automotive Component Carrier*, 2010 WL 4136958 (E.D. Mich., October 18, 2010).

Automotive Component Courier (“ACC”) is a truckload carrier that specializes in the delivery of automotive parts. It had been created when General Motors spun off its North American Operations Transportation Fleet Unit. The ACC retirees – as former GM employees –
received medical coverage at the unreduced GM benefit level, notwithstanding the fact that GM retirees had experienced benefit reductions over the past 5 years under successive GM–UAW VEBA agreements in 2005, 2007 and 2009. The cost of those unreduced GM benefit levels was borne by ACC with the financial assistance of a General Motors subsidy.

General Motors’ 2009 bankruptcy ended the subsidy. Given this development – and absent a reduction in expenses – ACC could not survive. ACC therefore entered into negotiations with the UAW pursuant to a Memorandum of Understanding (“MOU”) between the two parties providing that the ACC and the UAW would negotiate and establish a voluntary employees beneficiary association (“VEBA”) to offer post-retirement medical and life insurance benefits to those who had retired prior to August 1, 2009. When the negotiations failed to produce a VEBA, ACC announced it would unilaterally modify or discontinue the retiree health benefits in question. This lawsuit then ensued; significantly, the suit was initiated by the retirees alone. Along with its answer to plaintiffs’ complaint, ACC filed a third-party complaint against the UAW alleging that it had violated the MOU by failing to engage in substantive negotiations regarding the establishment of VEBA. Negotiations resumed, with the addition of class counsel. A settlement was eventually reached resulting in the establishment of a VEBA.

Once the VEBA was funded by ACC in the amount agreed to by all the parties – class members, the UAW and ACC – the Company, pursuant to the terms of the Settlement Agreement, would have no further obligation in regard to the retiree health benefits, and would have no connection with the VEBA. Instead, the VEBA would be governed by an independent committee consisting of four independent members and three members appointed by the UAW. Decisions by the VEBA committee would require at least one vote from an independent member and one vote from a UAW member.

Although this structure – given the lack of any management-appointed Trustees – would normally pose problems under §302(c)(5), it arguably passes muster under §302(c)(2) as a resolution of bona fide dispute. Indeed, the District Court in that case specifically held in its opinion that “ACC payments to the VEBA and of costs and fees pursuant to the Settlement Agreement [ ] comply with the requirements of Section 302(c)(2) of the Labor-Management Relations Act, 29 U.S.C. §186(c)(2). See U.S. v. Mabry, 518 F.3d 442, 447 (6th Cir. 2008).” 2010 WL 4136958 at *22.

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B. Appointment and Duties of Trustees

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C. Arbitration of Trustee Deadlocks

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D. Sole and Exclusive Benefit Rule

1. **Historical Development of Judicial Review of Plan Terms and Administration**

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2. **Judicial Review of Plan Terms and Administration**

Litigation regarding the governance of a multiemployer plan frequently concerns disputes among the Union and Management Trustees. These are occasions, however, when such litigation relates to other matters covered by the Trust Agreement. In *Service Employees International Union v. Roselli*, 2010 WL 1881469 (N.D. Cal. May 10, 2010), the issue was the proper amendment of the Trust Agreement, which arose out of a dispute between the Union Trustees and the Union.

The United Healthcare Workers (“UHW”) has been a part of the Service Employees International Union (“SEIU”) since the 1930’s. Following disagreements between the leaders of the SEIU and the leaders of the UHW, the SEIU decided to place a trusteeship upon the UHW as provided by the SEIU Constitution; the trusteeship was scheduled to commence on January 27, 2009. In the months preceding the imposition of the trusteeship, the UHW leadership prepared to resist the trusteeship.

In part, this struggle concerned the control of the SEIU United Healthcare Workers West and Joint Employers Education Fund. In 2004, when the Fund was first created, Article III, Section 1 of the Trust Agreement specified that the “three initial Trustees representing the employees shall be appointed by the Union by an instrument in writing signed by the Executive Officer of the Union.” Article III, Section 5 of the Agreement similarly specified that “[a]ny Employee Trustee may be removed from office at any time, for any reason, by an instrument in writing signed by the Executive Officer of the Union . . .”

In December 2004, the then-Executive Officer of the SEIU United Healthcare Workers West Union appointed 3 Employee Trustees. Subsequently, the Board of Trustees for the Fund was expanded from six members to ten members and thus, the number of Employee Trustees was correspondingly increased to five. Contemporaneous with the increase in the number of the Fund’s Trustees, Article III Section 1 was amended to reflect the increased number of Trustees: “The five Trustees representing employees shall be appointed by the Union by an instrument in writing signed by the Executive Officer of the Union.”

In 2008, however, – the year preceding the imposition of the trusteeship – Article III, Section 1 of the Trust Agreement was amended to read as follows: “the five Trustees representing the employees shall be appointed hereafter by an instrument in writing signed by a *majority of the employee Trustees.*” *Id.* at *5 (emphasis added.). In addition, Article III, Section 5 was similarly amended to provide that any employee Trustee could be removed . . . by a *majority of the employee Trustees . . .” *Id.* (emphasis added).
After the January 2009 trusteeship was imposed, the UHW sent a memorandum to the Fund purporting to remove the then-incumbent Employee Trustees from the Board. The incumbent Trustees, relying on the amended language in Article III of the Trust Agreement, refused to leave, asserting that the UHW had no power to remove them based on the March 2008 amendments. The UHW then filed suit under ERISA 502(a)(3) seeking to have the incumbent Trustees removed.

The Court held that the March 2008 amendments were invalid because, contrary to the provisions of Article IX of the Trustee Agreement, they had altered the basic principles of the Trust and the incumbent Trustees had therefore violated their fiduciary duties under ERISA §404(a)(1)(D).

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III. CRIMINAL LIABILITY UNDER SECTION 302

There were no criminal cases reported in regard to § 302 for 2010.

IV. ACTIONS TO ENFORCE CONTRIBUTION OBLIGATION

A. Duty to Pursue Recovery of Delinquent Contributions

B. Judicial Enforcement of Contribution Obligation

1. Subject Matter Jurisdiction

   a. Who May Bring Collection Actions

   In Line Construction Benefit Fund v. Allied Electrical Contractors, Inc., supra, the Court of Appeals rejected an employer’s claim that the Plan lacked standing to bring a collection action under Section 502(e), and held that a multiemployer plan is a fiduciary for purposes of Section 502(e). Affirming the district court, the 7th Circuit Court held that the employer was bound to the collective bargaining agreement prior to its execution of a letter of consent, since it had made contributions for 13 years prior to execution of the agreement, and had manifested assent to the latest agreement.

   b. Primary Jurisdiction Issues

   In Nova Casualty Co. v. Tech-Elec Electrical Contractors Corp., 2010 WL 2541201 (S.D.N.Y. June 7, 2010), an amended state court complaint by a surety company naming the contractor and ERISA funds in an action to recover a bond payment failed to present any federal claims, and was remanded back to state court where the claims were outside the scope of ERISA § 502(a)’s civil enforcement provisions.

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d. Jurisdiction Issues Where the Collective Bargaining Agreement Has Expired

In *United Association Local 198 Pension Fund v. Louisiana Pipe & Steel Fabricators LLC*, 2010 WL 4955133 (M.D. La. Nov. 30, 2010), the Court denied plaintiff Fund’s motion for summary judgment, finding that there existed a genuine issue of fact as to whether there was an enforceable collective bargaining agreement requiring contributions to the Fund where the written agreement had expired. The Court found insufficient evidence that the employer’s post-expiration conduct manifested an intent to be bound where the employer did not use the union hiring hall or make benefit contributions on behalf of all of its employees covered by the agreement.

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2. **Contract Validity Defenses**

3. **Miscellaneous Other Defenses**

4. **Contract Interpretation Issues**

In *Central States, Southeast and Southwest Pension Fund v. Waste Management of Michigan, Inc.*, 2010 WL 3527549 (N.D. Ill. Sept. 2, 2010), the Court granted summary judgment in favor of the multiemployer pension fund for delinquent contributions owed where the new collective bargaining agreement that purported to eliminate the duty to contribute was invalid under the company’s participation agreement with the pension fund established by prior agreement. The old collective bargaining agreement and obligation to contribute was not set to expire at time of the effective date of the new agreement, and the employer did not provide written notice of its intent to cancel the obligation to contribute, as required by the participation agreement.

5. **Scope of Contribution Obligation**

6. **Res Judicata and Collateral Estoppel**

In *New York District Council of Carpenters Pension Fund v. KW Construction, Inc.*, 2010 WL 3958799 (S.D.N.Y. Sept. 8, 2010), the Court found that an employer who participated in arbitration but failed to raise an objection that it was not bound to the collective bargaining agreement is barred by res judicata from raising the issue in a Section 515 action. The Court granted the multiemployer funds summary judgment on the issue of the employer’s obligation to contribute, but denied summary judgment with respect to issues regarding damages, personal liability, fraudulent conveyance, as there was a dispute regarding material facts, which must be resolved at trial.

7. **Personal Jurisdiction**

8. **Venue**

9. **Statute of Limitations**

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10. **Right to Jury Trial**

C. **Determining Violation of Contribution Obligation**

D. **Audit Rights**

E. **Remedies Available Upon Finding of Delinquency**

1. **Applicability of Section 502(g)(2), Unpaid Contributions and Liquidated Damages**

   In *International Painters and Allied Trades Industry Pension Fund v. M-K Signs, Inc.*, 713 F.Supp.2d 56 (D.D.C. 2010), multiemployer funds obtained a default judgment against a signatory employer and its alter ego where the complaint alleged that the companies had identical officers and management, used same employees and equipment, operated out of the same facility and were aware of the signatory contractor’s obligation to the multiemployer funds. The Court held that the plaintiff funds were entitled to audit the payroll records of the signatory employer and its alter ego, submission of all outstanding remittance reports, and a check for the amount of contributions owed.

2. **Interest**

   In *Crosthwaite v. AAA Construction Group, Inc.*, 2010 WL 5138726 (N.D. Cal. Dec. 10, 2010), the Court granted default judgment to multiemployer fund trustees, finding that the trustees were entitled to relief for unpaid contributions. Their request for liquidated damages and interest, however, was denied, as the Court determined that the claim failed to provide sufficient supporting documentation that would permit the Court to determine whether damages and interest were paid prior to the filing of the lawsuit.

3. **Attorneys’ Fees and Costs**

   In *Einhorn v. M.L. Ruberton Construction Company*, 720 F.Supp.2d 639 (D.N.J. 2010), the Court granted summary judgment to an employer who defeated an effort to assert successor liability for delinquent contributions and who then sought attorneys’ fees under ERISA § 502(g)(1). Denying the attorneys’ fees motion, the Court found that, while the ERISA Fund could afford an award of attorneys’ fees, (1) the Fund did not bring the action in bad faith, (2) ERISA objectives would be undermined if an award of attorneys’ fees deterred fund managers from bringing potentially meritorious claims pursuant to their fiduciary duty, and (3) the award of fees would not benefit the plan participants.

4. **Injunctive Relief**

   In *Crosthwaite v. AAA Construction Group, Inc.*, *supra*, an employer with a history of nonpayment of contributions was enjoined to provide monthly remittance reports to the counsel for the plaintiff fund. Plaintiffs were required to serve the injunctive order on the employer within 30 days of the entry of the order to subject the defendant to the contempt powers of the district court.
5. Other Remedies

6. Remedy Issues Unique to Audits

F. Individual Liability, Piercing the Corporate Veil and Liability of Others

1. Individual Liability

*United Union of Roofers, Waterproofers, and Allied Workers Local 210 v. A.W. Farrell & Son, Inc.,* 2010 WL 883676 (W.D.N.Y. March 5, 2010) (Individual defendants’ motion for summary judgment denied where sufficient facts existed to show that individual corporate officers actively participated in establishment of alter ego with intent to defraud multiemployer ERISA funds).

2. Liability of Affiliated Company as Alter Ego

*International Painters and Allied Trades Industry Pension Fund v. M-K Signs, Inc.,* *supra,* multiemployer funds obtained a default judgment against a signatory employer and its alter ego where complaint alleged companies had identical officers and management, used same employees and equipment and operated out of the same facility and were aware of signatory contractor’s obligation to multiemployer funds.

* G. Non-ERISA Enforcement of Contribution Obligation

H. Return of Employer Contributions

I. Claims for Contributions Due to Pension Plan’s Failure to Meet Minimum Funding Standards

*Gastronomical Workers Local Union 610 & Metropolitan Hotel Association Pension Fund v. Dorado Beach Hotel Corporation,* 617 F.3d 54, 49 EBC 2099 (1st Cir. 2010), multiemployer plan trustees bought an action under ERISA § 502(a)(3) for an order requiring participating employers to contribute additional monies beyond the amounts set out in the collective bargaining agreements needed to satisfy the pre-PPA minimum funding requirements of ERISA. The district court granted summary judgment to the trustees ruling that the employers were liable under Section 302 for the additional sums. The trustees filed a post-judgment motion for attorneys’ fees, interest, and costs, which was denied.

On appeal, the First Circuit Court rejected the employers’ argument that the case was not ripe for adjudication since the IRS had not acted on the minimum funding waiver application. The Court determined that the funding deficiency and the employers’ responsibility for it were facts that, coupled with the injury to the Fund, made the timely. Additionally, the Court rejected the employers’ argument that their obligation to make contributions was limited to the amounts required under the collective bargaining agreement since the statutory obligation of minimum funding existed independent of any contractual obligations made through collective bargaining. However, the Court of Appeals vacated the judgment and remanded the case back to the district
court due to the existence of an issue of material fact raised by the employers as to whether the funding deficiency still existed and could be cured through equitable relief available under section 502(a)(3).

V. FUNDING RULES FOR MULTIEMPLOYER PLANS

A. Changes to Basic Funding Rules for Multiemployer Plans

The Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (“Pension Relief Act”) provided relief targeting the market investment losses that multiemployer plans incurred in their first plan year ending after August 31, 2008, or the following plan year, and was designed to give plans and their stakeholders additional time to address and absorb these losses, than what was afforded under the funding rules of the Pension Protection Act (“PPA”).

Certain multiemployer plans were given an opportunity to elect to amortize investment losses and to smooth asset values over a longer period through the Pension Relief Act. Under the PPA, multiemployer plans must amortize net experience gains and losses over a 15-year period.1 Under the Pension Relief Act, they may extend the amortization period of “net investment losses” to 30 years (actually, 29 years as the current plan year must be included in the period).2

Also, under PPA, multiemployer plans currently may reduce plan funding volatility by smoothing asset values over a period of five years, as long as the smoothed value remains within an 80%/120% corridor of actual asset values. The Pension Relief Act permits eligible multiemployer plans to elect to smooth asset values over a period of up to 10 years and to expand the corridor to 80%/130% of actual asset values.3 Again, electing one or both of the multiemployer plan alternatives does not eliminate any funding obligation, but rather it shifts a portion of the current year’s obligation to future years.

These multiemployer plan elections apply only to the first two plan years beginning after August 31, 2008.4 The plan sponsor may elect to apply the extension or the asset smoothing to either or both of such years.5 To qualify for both of the above elections, the plan must pass a solvency test by having its actuary certify that the plan is projected to have sufficient assets to pay expected benefits and expenditures over the amortization period, including any extension under the Pension Relief Act.6

The Pension Relief Act provides that if a multiemployer plan elects any of the relief options, then no plan amendment increasing benefits can go into effect during the two year plan years following a plan year for which the relief applies, unless the benefit falls within either of two narrow exceptions.7 The first applies if the plan amendment is required to comply with

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2 Code §431(b)(8)(A); IRS Notice 2010-56.
3 Code §431(b)(8)(B); IRS Notice 2010-56.
4 Code §431(b)(8)(A); IRS Notice 2010-56.
5 Code §431(b)(8)(A); IRS Notice 2010-56.
6 Code §431(b)(8)(C); IRS Notice 2010-56.
7 Code §431(b)(8)(D)
applicable law or to maintain the plan’s qualified status. The second applies if the plan actuary certifies that the benefit increase is paid out of newly bargained contributions, and that the benefit increase will not have a negative effect on the plan’s funded percentage or projected credit balance during the two-year restriction period. The restriction took place on June 25, 2010.

An electing plan sponsor must provide notice of the election to both plan participants and the Pension Benefit Guaranty Corporation (“PBGC”). Unlike the Worker, Retiree, and Employer Recovery Act of 2008 (“WRERA”), notice to contributing employers, unions representing participants and the Department of Labor is not required.

VI. Multiemployer Pension Plan Amendments Act-Plan Termination Insurance

There were no cases reported in regard to this section for 2010.

VII. Coal Industry Retiree Health Benefit Act of 1992

There were no new reported cases regarding the Coal Act for 2010.

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8 Code §431(b)(8)(D)(i)(I)
9 Code §431(b)(8)(D)(i)(II)
10 Code §431(b)(8)(E).