



What Trustees In Bankruptcy Need To Know About Pension Plans

2013 EXPERT SERIES



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Background on Bankruptcy and Retirement



ERISA Fiduciary Duties Imposed on Bankruptcy Trustee

- Code Section 541(b)(7) excludes plan from estate
- BAPCPA of 2005 added Code Section 704(a)(11) ¹
- Trustee must serve as plan's ERISA "administrator" ²
- DOL Position: Trustee is plan fiduciary

¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added several new duties to Chapter 7 bankruptcy trustees, including a new plan-related duty under Section 704(a)(11) of the U.S. Bankruptcy Code.

² ERISA Section 3(16).



Conflict between ERISA and Bankruptcy Code

- Duty to participants vs. duty to creditors and debtor
- Personal liability for fiduciary breaches under ERISA
- Immunity for trustee acts authorized by bankruptcy court

DOL's Position in Bankruptcy Court

- Court cannot authorize specific acts to terminate plan
- Court cannot order fee payment from plan assets
- Trustee cannot be released from ERISA liability

Plan Termination Considerations for Bankruptcy Trustee

Plan Termination and Potential Fiduciary Liability

- Trustee may be personally liable for any participant losses
- Heightened risk exposure when plan assets are liquidated
- Fiduciary duty to maintain tax-qualified status and file 5500s

Plan Documentation

- Resolution to terminate plan
- Amendment to update plan for qualification purposes
- IRS amnesty program for late amendments (EPCRS) ³
- Consider IRS determination letter submission (Form 5310)

Form 5500 Requirements

- Annual 5500 filings and related financial audits
- Final 5500 filing for plan year of final distributions
- DOL amnesty program for delinquent filings (DFVCP) ⁴

⁴ DOL Delinquent Filer Voluntary Compliance Program.

Participants

- Notices for plan termination and distribution options
- Search for missing participants and consider automatic IRAs⁵
- Must distribute assets within 12 months

Proposed Expansion of DOL's Abandoned Plan Program

Purpose of Abandoned Plan Program

- Safe and streamlined process to terminate DC plans
- Limited relief for common compliance issues
- Administrative burdens and costs reduced

Key Features of Program

- Role of Qualified Termination Administrator (QTA)
- Safe harbor for distributions to missing participants
- Annual Form 5500 reporting relief
- Exemption for QTA's use of plan assets to pay itself

Program Availability to Bankruptcy Trustees?

- DOL Position: Trustees do not “need” program.
- Program not currently available to bankruptcy trustees
- DOL will stop bankruptcy court from approving program use

DOL's Proposal to Expand Program Eligibility ⁶

- Plan “abandoned” when bankruptcy proceedings commence
- Trustee (or designee) may serve as QTA for a fee
- Must evaluate delinquent plan contributions
- Trustee must report any breaches by prior fiduciaries

⁶ According to the DOL's semiannual regulatory agenda (dated July 3, 2013), the final rule and amended program is scheduled for release in January 2014.



Best Practices for Bankruptcy Trustee



Fee-Related Restrictions

- Trustee cannot use plan assets to pay itself
- Review plan document's fee provisions
- “Reasonable” and “necessary” costs charged to plan assets
- Gather info on qualifications, quality and prevailing fees

Specialized Providers

- Provider of QTA-Related Services (e.g., missing participants)
- ERISA Counsel (e.g., IRS and DOL amnesty programs)
- Role of Plan's Existing TPA

Timing

- Former employees are likely cashing out of plan
- Terminate and distribute benefits as soon as practicable
- Check on status of DOL proposal to expand program (Early 2014)

Bankruptcy Court Approval

- Jurisdictional issues with DOL still evolving
- Request general approval for plan termination and providers
- Do not request approval for specific acts or liability release

Concluding Thoughts

