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PBGC FINALIZES MEDIATION PROGRAM, ADDS FIDUCIARY BREACH CASES

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Feb. 4, 2019

The Pension Benefit Guaranty Corporation (PBGC) is making its plan sponsor mediation program permanent and expanding it to include fiduciary breach cases, the agency [announced](#) on Jan. 24. The program originally operated as a one-year pilot to help PBGC resolve disputes with defined benefit plan sponsors and fiduciaries in Early Warning cases and termination liability cases. The changes are effective from January 2019.

Early Warning cases. Under the Early Warning Program, PBGC examines corporate transactions that may increase the risk of plan failure. Mediation may help resolve disputes over how much risk the transaction poses to the plan. PBGC will advise companies of their eligibility at the outset of negotiations, and mediation will be available once the agency receives sufficient responses to its information requests. Mediation must be completed before the closing date of the corporate transaction, with sufficient time for both sides to document the resolution or take legal action if warranted.

Termination liability cases. When a pension plan is terminated and transferred to the PBGC, the sponsor and all members of its controlled group are liable for the amount of plan underfunding. Mediation is available when the plan sponsor and PBGC disagree about how much of the underfunding can be collected. Section 4062.6 of PBGC's single-employer termination liability regulation requires plan sponsors to provide certain net worth information within 120 days after the proposed termination date. Negotiations will begin once PBGC has an opportunity to review, verify and analyze that information.

Fiduciary breach cases. In the case of a fiduciary breach, PBGC as the statutory trustee may negotiate with the fiduciary of a terminated plan to determine the repayment to the plan for losses incurred in connection with the breach. PBGC will include the option to mediate in all demand letters sent in connection with fiduciary breach cases.

Participation in program. PBGC offers mediation only to cases it selects, and participation in the program is voluntary. But a case isn't eligible for mediation if the plan sponsor has a minimal ability to pay, a court proceeding is pending, or time is limited and the plan sponsor has declined to sign a standstill or tolling agreement.

Selection and payment of mediators. PBGC obtains mediators from the [Federal Mediation and Conciliation Service](#). The parties to the mediation split the costs to avoid any appearance of impartiality.

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Non-Mercer Resources

- [PBGC Mediation Program](#)
- [Risk Mitigation & Early Warning Program](#)

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