

# Plant Shutdown

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## A. Background

An unpredictable contingent event benefit (UCEB) is any benefit or benefit increase that becomes payable as a result of an unpredictable contingent event (UCE), such as a plant shutdown, permanent layoff, or other reduction in force. UCEBs typically trigger payment of the full pension to a participant, without any reduction for age, starting earlier than an unreduced pension would otherwise be payable. Because a plan sponsor is not required to fund a UCEB until after the UCE occurs, UCEBs have resulted in significant losses to the pension insurance program.

Before enactment of the Pension Protection Act of 2006 (PPA 2006), PBGC generally guaranteed a UCEB like any other plan benefit, phasing in any benefit increase from the later of the adoption date of the plan provision creating the UCEB and the effective date of the UCEB. PPA 2006 amended ERISA to require that PBGC phase in the UCEB as if the adoption date of the plan provision creating the UCEB was the date the UCE occurred. This means that PBGC phases in a UCEB from the latest of the adoption date of the applicable plan provision, the effective date of the UCEB, and the date the UCE occurred. PBGC has incorporated these changes into PBGC Reg. §4022.2 (definitions of UCE and UCEB) and §4022.27 (phase-in of guarantee of UCEBs). See 79 Fed Reg. 25667 (May 6, 2014).

PPA 2006 also added section 436(b) of the Internal Revenue Code (Code) to address UCEBs. Under section 436(b), payment of UCEBs is prohibited if the plan is less than 60% funded for the plan year in which the UCE occurs. A UCEB that is restricted at plan termination is not a benefit under the plan. (See PBGC Internal Guidance PPA 436 Benefit Limitations.)

## B. Scope and Effective Date

This PBGC internal guidance applies to single-employer trustee plans and addresses UCEBs that become payable as a result of a UCE occurring after July 26, 2005. Section D.4 below is effective as of January 1, 2008, and covers only trustee plans with a DOPT during or after the first plan year beginning on or after January 1, 2008.

## C. Definitions

1. **Unpredictable Contingent Event (UCE)** means a plant shutdown or similar event, or any event triggering benefit entitlement other than the attainment of any age, the performance of service, the receipt of compensation, the occurrence of death, or the occurrence of disability. Examples of UCEs are the full or partial closing of a plant or other facility, as well as a permanent layoff or workforce reduction. (Permanent layoffs also include layoffs during which a laid-off employee continues to earn credited service ("creep-type" layoff) for a specified period of time (for example, two years), after which the layoff is deemed permanent, or until some further UCE

such as a declaration by the employer that the participant's return to work is unlikely or that suitable work in the employee's specified area will not be found.)

2. **Unpredictable Contingent Event Benefit (UCEB)** means any plan benefit or benefit increase to the extent that the plan benefit or benefit increase would not be payable but for the occurrence of a UCE. Examples of UCEBs are unreduced early retirement benefits and subsidies payable immediately after the occurrence of a UCE. For example, an early retirement benefit of \$80.00 per month is payable upon the occurrence of plant shutdown. Absent a plant shutdown, only \$20.00 per month would have been payable. In this case, the UCEB would equal \$60.00 per month (\$80.00 less \$20.00).

## D. Internal Guidance

PBGC will guarantee a plan UCEB at a rate of 20% (or \$20.00 if greater) for each full year the UCEB was payable during the UCEB phase-in period. The UCEB phase-in period will begin on the latest of:

- the adoption date of the plan provision creating the UCEB;
- the effective date of the UCEB (that is, the first date on which the UCEB could become payable under plan provisions); and
- the date the UCE occurred.

The UCEB phase-in period will end on DOPT/BPD (that is, on DOPT unless the plan is a PPA 2006 bankruptcy plan, in which case the UCEB phase-in period will end on the earlier of DOPT and BPD. See PBGC Internal Guidance Benefits in PPA 2006 Bankruptcy Plans.)

**Example 1 - UCEB phase-in period.** DOPT/BPD is 12/01/2015. On 01/01/2006, the plan adopted a 70/80 rule for plant shutdowns occurring on or after 01/01/2007. (Under the 70/80 rule, early unreduced retirement benefits become immediately payable to participants whose age plus service equals 70 (if at least age 55) or 80 (at any age) if permanently laid off due to plant shutdown.) On 12/31/2014, plant operations ceased, and all employees were permanently laid off.

The UCE occurred 12/31/2014, the date plan operations ceased and all employees were permanently laid off. Therefore, the UCEB phase-in period begins on 12/31/2014, the latest of the adoption date of the plan provision creating the UCEB (01/01/2006), the effective date of the UCEB (01/01/2007), and the date the UCE occurred (12/31/2014). The UCEB phase-in period ends on DOPT/BPD (12/01/2015). Thus, the phase-in period lasted for less than one year, so the UCEB is a nonforfeitable plan benefit subject to 0% phase-in. (Note that the UCEB is a nonforfeitable plan benefit because the UCEB became payable on or before DOPT/BPD. See also section D.1.b below.)

### 1. Determining the Date the UCE Occurred

To determine the date the UCE occurred, PBGC will consider plan provisions as well as relevant facts and circumstances, including (but not limited to):

- the nature and level of activity at a facility that is closing;

- the extent to which the UCE is permanent; and
- statements or determinations (to the extent relevant) by the employer, the plan administrator, a union, an arbitrator under a collective bargaining agreement, or a court; however, PBGC will not treat such statements or determinations as controlling.

a. **Predictability of the UCE Not a Factor**

The fact that a UCE has become reasonably predictable (for example, the facility was widely anticipated to close) or has already occurred (for example, a UCEB payable as a result of a retroactive UCE) does not mean the benefit is no longer a UCEB.

**Example 2 - Retroactive UCE.** DOPT/BPD is 02/01/2017. On 09/01/2014, as the result of a settlement of a class-action suit, the plan adopted a provision for paying early unreduced retirement benefits to eligible employees permanently laid off due to a shutdown occurring on or after 01/01/2014. However, under the adopted plan provision, early unreduced retirement benefits were payable prospectively only, beginning on or after 03/01/2015. On 01/01/2014, plant operations ceased, and all employees were permanently laid off.

The UCE occurred on 01/01/2014, the date plant operations ceased and all employees were laid off. The effective date of the UCEB is 03/01/2015, the first date any UCEB was payable. Therefore, the UCEB phase-in period begins on 03/01/2015, the latest of the adoption date of the plan provision creating the UCEB (09/01/2014), the effective date of the UCEB (03/01/2015), and the date the UCE occurred (01/01/2014). The phase-in period ends on DOPT/BPD (02/01/2017). Thus, the UCEB phase-in period lasted for more than one year and fewer than two years, so the UCEB is a plan benefit subject to 20% phase in.

b. **UCEBs Attributable to Post-DOPT UCEs Are Not Plan Benefits**

If the UCE occurs after DOPT, the UCEB will not be a benefit payable by PBGC, regardless of plan assets or PBGC recoveries.

**Example 3 - Skeleton shutdown crew.** DOPT/BPD is 12/01/2015. On 01/01/2006, the plan was amended to pay early unreduced retirement benefits to eligible employees if permanently laid off due to a shutdown occurring on or after 01/01/2007. On 12/31/2014, plant operations generally ceased, and most employees were permanently laid off. A minimal skeleton crew remained to perform primarily security and basic maintenance functions. On 03/31/2016, the plant was demolished, and the skeleton crew was permanently laid off. The plan contained no specific provision or past practice governing benefits of skeleton shutdown crews.

For the skeleton shutdown crew, the UCE occurred on 03/31/2016. Because the UCE occurred after DOPT/BPD (12/01/2015), the UCEB would not be a nonforfeitable benefit as of that date and therefore would not be guaranteeable.

c. **Post-Employment Eligibility Requirements**

If plan terms allow a participant to meet certain eligibility requirements after his employment ends, PBGC will not generally consider the date on which those special post-

employment eligibility requirements are met (such as attainment of a plan-specified age) in determining the date the UCEB phase-in period begins.

**Example 4 - Post-employment eligibility.** DOPT/BPD is 09/01/2015. Under the plan, adopted and effective since 2000, in the event of a permanent plant shutdown unreduced early retirement benefits are payable to participants who (1) are age 60 or older, (2) have earned at least 20 years of service, and (3) terminate employment due to the shutdown. In addition, participants with at least 20 years of service who terminate employment due to a plant shutdown at a time when they are under 60 years of age will be entitled to an early unreduced retirement benefit so long as benefits commence on or after the attainment of age 60 and the time required to attain age 60 does not exceed the years of service with the plan sponsor. The plan imposes no other conditions on receipt of the benefit. On 01/01/2014, the plant permanently shut down. A participant whose employment was terminated due to the permanent plant shutdown had 20 years of service and was age 58. On 06/01/2015, the participant attained age 60 and entered pay status with the early unreduced retirement benefit.

The UCE occurred on 01/01/2014, the date of the only UCE necessary to make the UCEBs payable. The plan had been in effect for five years as of DOPT. Therefore, the UCEB phase-in period begins on the date the UCE occurred (01/01/2014). The phase-in period ends on DOPT/BPD (09/01/2015). Thus, the phase-in period lasted for more than one year and fewer than two years, so the UCEB is a plan benefit subject to 20% phase in.

## 2. Multiple UCEs

If a UCEB under a plan is payable only upon the occurrence of multiple UCEs, PBGC treats the date of the last applicable UCE as the date the UCE occurred. For example, if a UCEB is payable only if a participant is permanently laid off and the plan deems layoffs to be permanent after two years, then the UCEB phase-in period will generally begin at the end of the two-year period following the date on which the participant was laid off (not the date on which the participant was laid off).

**Example 5 - Creep-type layoff benefit.** DOPT/BPD is 09/01/2017. Under the plan, adopted and effective in 2000, early unreduced retirement benefits are payable to participants whose age plus service is at least 80 and whose continuous service is broken due to either (1) plant shutdown or (2) being on layoff status for two years (creep-type layoff). On 05/15/2014, a participant was laid off as part of a reduction-in-force. On 05/15/2016, the participant's continuous service was broken due to layoff. On 06/01/2016, the participant entered pay with the UCEB.

There are two UCEs necessary to make the participant's benefit payable: the participant's initial layoff (05/15/2014) and the expiration of the participant's two-year period without rehire (05/15/2016). The plan had been in effect for five years as of DOPT. Therefore, the phase-in period begins on the date the last UCE occurred (05/15/2016). The phase-in period ends on DOPT/BPD (09/01/2017). Thus, the UCEB phase-in period lasted for more than one year and fewer than two years, so the UCEB is a plan benefit subject to 20% phase in.

If the UCEB is contingent upon the employer's declaration that return to work is unlikely PBGC will also take this into account for purposes of determining the date the UCE occurred.

**Example 6 - Declaration that return to work is unlikely.** DOPT/BPD is 09/01/2016. Under the plan, adopted and effective in 2000, unreduced early retirement benefits are payable to participants (1) who are at least age 60 with at least 20 years of continuous service and (2) whose continuous service is broken by permanent layoff. Under the 2000 plan, a participant's continuous service is broken if the participant is laid off and the employer declares that return to work is unlikely. While laid off, employees may earn up to two years of additional credited service. On 03/01/2014, a participant age 60 with 20 years of service was laid off. On 06/15/2014, the employer declares that the participant's return to work is unlikely. On 07/01/2014, the participant went into pay status with the UCEB.

There are two UCEs necessary to make the participant's benefit payable: the participant's initial layoff (03/01/2014) and the employer's declaration that the participant is unlikely to return to work (06/15/2014). The plan had been in effect for five years as of DOPT/BPD. Therefore, the phase-in period begins on the date the last UCE occurred (06/15/2014). The phase-in period ends on DOPT/BPD (09/01/2016). Thus, the phase-in period lasted for more than two years and fewer than three years, so the UCEB is a plan benefit subject to 40% phase in.

### 3. Determination and Disclosure of UCE Date

#### a. Determination of UCE Date on Participant-by-Participant Basis

Whether the UCEB phase-in period is determined on a participant-by-participant, facility-by-facility, or on some other basis will depend largely upon plan provisions. Thus, if the plan specifies that a UCEB is payable due to a reduction-in-force and the reduction-in-force is staggered, the UCEB phase-in period may differ with respect to each participant and each layoff. But if the UCEB is payable only upon a complete shutdown of an employer's entire operations, the UCEB phase-in period generally will be the same date for all affected participants.

**Example 7 - Sequential Layoffs.** DOPT/BPD is 12/01/2015. On 01/01/2006, the plan adopted a 70/80 rule for plant shutdowns occurring on or after 01/01/2007. Under the plan, early unreduced retirement benefits become immediately payable to eligible participants if permanently laid off due to a plant shutdown. On 12/31/2014, plant operations permanently ceased. Employees were permanently laid off in three stages: Group A on 10/31/2014; Group B on 11/30/2014; and Group C on 12/31/2014.

For Group A, the UCE occurred on 10/31/2014; for Group B, on 11/30/2014; and for Group C, on 12/31/2014. The plan had been in effect for five years as of DOPT/BPD. Therefore, the phase-in periods begin on the date the applicable UCE occurred (Group A on 10/31/2014, Group B on 11/30/2014, and Group C on 12/31/2014). The UCEB phase-in periods end on DOPT/BPD (12/01/2015). Thus, for Groups A and B, the UCEB phase-in period lasted for more than one year and fewer than two years, so their UCEBs are plan benefits subject to 20% phase in. For Group C, the UCEB phase-in period lasted for less than one year, so their UCEBs are nonforfeitable plan benefits subject to 0% phase in.

#### b. Disclosure of UCE Date in Benefit Determination Letters

If a UCEB is neither fully guaranteed by PBGC nor fully funded by the asset allocation, PBGC will, in its benefit determinations, include the date the UCE occurred and the information necessary to

understand the application of the UCEB phase-in limitation. The amount of information included in the benefit determination will depend on the facts and circumstances of each case. For example, PBGC may describe in the benefit statement accompanying a participant's benefit determination letter the date the UCE occurred and how PBGC determined that date (for example, because that date was the later of two UCEs necessary to make the UCEB payable).

#### 4. Section 436 Restrictions

Any UCEB that, as of DOPT, was subject to the restricted payment rules of section 436(b) of the Code does not exist in the plan and is therefore not payable by PBGC. (Such a restriction applies if the UCE occurs during a plan year in which the plan's adjusted funding target attainment percentage (AFTAP) was less than 60% or would have been less than 60% if the UCEB were taken into account.) See PBGC Internal Guidance PPA 436 Benefit Limitations (describing the Treasury regulations under section 436).

If a restricted UCEB becomes payable as a result of the 436 restriction being removed later in the plan year—for example, after an adequate funding contribution is made—then PBGC will disregard the 436 restriction. The UCEB will still be subject to the UCEB phase-in rules, and the beginning of the UCEB phase-in period will be unaffected by any delay in the plan's payment of the UCEB due to the section 436(b) rules. See section D of PBGC Internal Guidance PPA 436 Benefit Limitations.

**Example 8 - Removal of Section 436 restriction.** DOPT/BPD is 09/01/2016. Under a plan provision adopted on 09/01/2000, an unreduced early retirement benefit becomes immediately payable to age/service-qualified participants permanently laid off due to a plant shutdown occurring after 01/01/2001. On 3/17/2014, the enrolled actuary certified the 2014 AFTAP to be 58%. On 04/15/2014, a participant eligible for the UCEB was permanently laid off due to a plant shutdown. On 08/15/2014, the plan sponsor made an additional contribution to the plan. On 09/15/2014, the actuary recertified the 2014 AFTAP to be 60% (taking into account the added liabilities caused by the UCEB) as a result of the additional contributions made to the plan. (The plan year is the calendar year.) On 10/01/2014, the participant began receiving benefit payments, including missed payments based on a retroactive annuity starting date of the UCEB as of 05/01/2014.

The UCE occurred on 04/15/2014. PBGC treats the UCEB as a benefit payable under the plan because, due to the additional contribution, the AFTAP was at least 60% for the 2014 plan year in which the UCE occurred. The UCEB provision was both adopted and effective more than five years before DOPT/BPD. Therefore, the UCEB phase-in period begins on the date the UCE occurred (04/15/2014). (Note that the delay in paying the UCEB to the participant does not affect the beginning of the UCEB phase-in period.) The UCEB phase-in periods ends on DOPT/BPD (09/01/2016). Thus, the UCEB phase-in period lasted for more than two years and fewer than three years, so the participant's UCEB is a plan benefit subject to 40% phase in.

In a case in which a UCEB does not become payable later in the plan year because of a removal of the 436(b) restriction, but the sponsor nonetheless seeks in a subsequent plan year to restore some or all of the UCEB, the sponsor may do so only by amending the plan so long as the amendment is permitted to take effect (for example, because the 436(c) limitation on plan amendments increasing benefit liabilities is not applicable). Such an amendment is subject to phase-in, and the UCEB phase-in period would generally begin on the adoption date of the amendment.

## **5. Assignment of UCEBs to PC3**

PPA's special phase-in rule for UCEBs did not amend the rules for determining which benefits are assignable PC3. Thus, as was the case before the enactment of PPA 2006, in determining benefits for PC3-eligible individuals, PBGC will assign a UCEB to PC3 if:

- the adoption date of the plan provision creating the UCEB was on or before DOPT/BPD-5;
- the effective date of the UCEB was on or before DOPT/BPD-5; and
- the UCE occurred on or before DOPT/BPD-3.

See PBGC Internal Guidance Allocation of Assets - Priority Category 3 for definitions of "DOPT/BPD-5" and "DOPT/BPD-3." Note that there is a difference in the way the two terms are defined, as illustrated in Example 9 below.

**Example 9 - UCEB in PC3.** DOPT/BPD is 12/15/2015, DOPT/BPD-3 is 12/15/2012, and DOPT/BPD-5 is 12/16/2010. PBGC will assign a UCEB to PC3 if:

- the adoption date of the plan provision creating the UCEB and the effective date of the UCEB were on or before 12/16/2010 (DOPT/BPD-5); and
- the UCE occurred on or before 12/15/2012 (DOPT/BPD-3)