

Preliminary Note

This fact sheet is intended to explain the basics and significance of corporate bankruptcy from a Union employee's perspective. It is not meant to constitute a legal opinion or advice, and does not replace independent consultation with an attorney. Each employer and employee's situation is unique. Accordingly, contact the Legal Department with any questions if you learn that your employer has filed a bankruptcy petition.

Introduction

In this uncertain economy, dozens of companies file for chapter 11 bankruptcy protection every week. Few situations are more stressful than wondering about the fate of your job and your employer. To help alleviate TWU members' concerns about bankruptcy rumors or employers' bankruptcy filing, this fact sheet provides a question-and-answer overview of the bankruptcy process for Union member employees of chapter 11 debtors and a glossary of the technical terminology specific to bankruptcy law.

What Will My Employer's Chapter 11 Bankruptcy Mean for Union Employees?

An employer's chapter 11 filing has a number of immediate effects on all of its creditors, as well as certain longer-term ramifications specific to retirees and Union employees:

Current Union Employees

- Wages for work you perform after your employer files for bankruptcy are entitled to administrative expense priority, meaning they get paid before nearly all other creditors.
- Wages and certain benefits already earned before the filing date are also entitled to administrative expense priority, subject to certain dollar limits. Employers typically request permission from the court at the outset of chapter 11 cases to pay pre-filing employee wages and benefits in the ordinary course of business.
- Your employer can seek court approval to reject your its labor agreement with the Union, but must first try to negotiate "necessary" modifications to the contract.
- Regardless of the outcome of contract negotiations, TWU remains your authorized bargaining representative in a chapter 11 bankruptcy. This means that your employer must bargain with TWU in good faith, and even if your employer rejects its contract with TWU it still must bargain with TWU pursuant to the federal labor laws.
- The automatic stay halts any existing litigation or debt-collection activity against the debtor while its case is ongoing. Such action may only resume if the bankruptcy court grants a lift-stay motion.

Retirees

- Your former employer can seek court approval to terminate or modify your pension plan.
- If your defined benefit pension plan is terminated and is fully funded (a "voluntary termination"), your employer will use plan assets to purchase an annuity to pay your benefits.
- If your pension plan is terminated by an employer in bankruptcy (a "distress termination") or by the PBGC (an "involuntary termination") and is underfunded, the PBGC will take over the plan's assets and liabilities. Your benefits will be paid by

the PBGC, not by your employer, and are subject to a maximum of \$4,500 per month for plans terminated in 2011.

What Is Chapter 7 Bankruptcy?

Chapter 7 bankruptcy, more common among individual debtors, is a liquidation proceeding whereby the debtor's assets are sold by a court-appointed trustee and distributed to creditors in order of priority. In business chapter 7 cases, whether filed as a chapter 7 or converted from a chapter 11, the debtor eventually ceases to exist. The majority of Union-employer bankruptcies are not chapter 7 bankruptcies.

What Is Chapter 11 Bankruptcy?

Chapter 11 bankruptcy is a process whereby companies seek to restructure their debt load through a combination of out-of-court negotiation and in-court litigation. Although bankruptcy courts have very broad authority to create remedies custom-tailored to a particular case, the endpoint of a chapter 11 case is the confirmation of a *plan of reorganization*, often just called a "plan," specifying who gets paid what and how.

In a true chapter 11 reorganization, your employer remains in business with a modified debt and ownership structure. While a reorganizing chapter 11 debtor may sell or close certain assets or divisions during the bankruptcy process, its ultimate goal is to remain in business. In a chapter 11 liquidation, the debtor ultimately ceases to exist, but does so through the chapter 11 plan process (often for tax reasons).

How Will My Employer's Bankruptcy Case Start?

A bankruptcy case begins with the filing of a bankruptcy petition in the United States Bankruptcy Court for the federal district where the Debtor has maintained its residence, domicile or principal place of business for the longest portion of the 180 days prior to the filing date.

The majority of chapter 11 cases are voluntary cases, meaning they are filed by debtors themselves. In an involuntary case, a group of three or more creditors seek to force an insolvent debtor into bankruptcy.

What Effect Does My Employer's Bankruptcy Filing Have?

Post-filing, a debtor's creditors may only pursue their claims through the bankruptcy court or with the court's permission. The debtor must comply with other laws, such as OSHA, WARN, COBRA, FMLA, and USERRA.

My Employer Owes Me Money. How Do I Assert My Rights?

In a Chapter 11 proceeding, the court sets a deadline, known as the "bar date," by which all creditors must file proof of claim forms stating the amount they are owed and the classification of the debt (administrative claim, priority claim, secured claim, or unsecured claim). In a Chapter 7 proceeding, creditors have 90 days after the initial Meeting of Creditors to file a proof of claim.

How Will I Get Paid?

Under the Bankruptcy Code, an operating Debtor must pay post-filing wages, benefits, insurance premiums, and pension contributions as administrative expenses. Debtors generally continue payments to employees on paid leave and insurance coverage, including short term disability coverage.

Pre-Bankruptcy Wages

Claims for wages, salaries, and commissions (including vacation, severance, and sick leave pay) accrued in the 180 days prior to the debtor's bankruptcy filing or the company's cessation of business, whichever is earlier, are allowed as priority claims up to \$10,950 per employee. All claims for wages, bonuses, salary, and commission (including vacation, severance and sick leave pay) that accrued more than 180 days prior to the debtor's bankruptcy filing or the company's cessation of business, whichever is earlier, are considered unsecured claims.

Benefit Plans

Contributions to employee benefit plans accrued in the 180 days prior to the filing of the bankruptcy petition or the company's cessation of business, whichever is earlier, are also allowed as priority claims. Benefits contributions to each plan are capped at \$10,950 times the number of employees covered by each such plan, less amounts paid to those employees by the bankruptcy estate as priority wage claims (see above) and to other employee benefits plans. Other unpaid contributions which accrued prior to the filing of the bankruptcy petition are considered ordinary unsecured claims.

Payroll Deductions

A company operating in chapter 11 bankruptcy will also continue to administer payroll deductions for union dues, health insurance, 401(k), and other required contributions. These deducted funds are held in trust for their respective purposes and do not become part of the bankruptcy estate.

Severance Pay

Claims for severance pay that arose prior to the bankruptcy are either priority or unsecured claims. Claims for severance pay that arose from a post-petition termination may be treated as administrative claims and may be paid in full. (For more information on this or any issue, contact the Legal Department).

Timing of Priority Payments to Employees

The general rule is that pre-petition employee priority or unsecured claims are not paid until formal distribution under the chapter 11 plan. In a chapter 7 proceeding, employee priority claims are not paid until assets are liquidated and dividends paid. Chapter 11 employers typically request permission from the bankruptcy court at the start of the case to make employee-related priority payments in the ordinary course of business.

What Happens to My Employer's Union Contract?

An employer's bankruptcy filing does not immediately affect the status of its collective bargaining agreement with the Union. All of the contract's provisions continue to govern the debtor's post-filing obligations to Union employees, including the applicable grievance procedures.

Under section 1113 of the Bankruptcy Code, the bankruptcy court may authorize an employer to reject—and thus terminate—a collective bargaining agreement if the debtor can prove to the bankruptcy court that

- (1) it proposed modifications to the collective bargaining agreement to the union;
- (2) the proposed modifications are necessary to permit the debtor's reorganization;

- (3) the debtor met with the union and shared information justifying the proposed modifications;
- (4) the debtor negotiated in good faith with the union; and
- (5) the union refused to accept the proposal modifications without good cause.

What modifications are "necessary" is not defined by the Bankruptcy Code, and courts use varying definitions. Essentially, however, section 1113 requires your employer to negotiate with the Union in good faith to modify its collective bargaining agreement before seeking authority to reject the contract.

If your employer successfully rejects its collective bargaining agreement, the Union remains your authorized representative, and the company must comply with applicable labor laws and continue to bargain with the Union in good faith.

What About My Pension?

As a safeguard against the risk that a defined benefit pension plan may contain insufficient funds to pay the promised benefits to workers upon retirement, a federal statute, ERISA, imposes minimum funding standards on plan sponsors. ERISA also established a pension insurance program that guarantees that retirees receive at least some of their earned benefits if and when an employer terminated an under-funded defined benefit plan. The Pension Benefit Guaranty Corporation ("PBGC") administers the pension insurance program. If a pension plan has insufficient assets to pay benefits, regardless of whether the plan sponsor is in bankruptcy, the PBGC will either provide financial assistance to the plan to enable it to pay certain guaranteed benefits or take over the plan and pay benefits directly to beneficiaries, up to a statutory maximum. For plans terminated in 2011, the PBGC's maximum benefit amount is \$4,500 per month (\$54,000 per year).

Other Benefit Plans

An employee's right to continue receiving other benefits, such as medical or health benefits, as well as accident or life insurance, depends on the terms of the contract or the company policy that established the benefits in question. Some benefits plan documents provide that the employer may terminate benefits at any time. Court generally enforces the terms of such benefit plans literally and permit termination where the plan so provides.

How Will My Employer Continue to Operate During Bankruptcy?

Chapter 11 debtors need cash to pay post-filing expenses as they become due. They typically get this cash from one of two sources: (A) cash already on hand or in the bank, along with cash generated by operations during bankruptcy, or (B) financing known as a debtor-in-possession (DIP) loan facility. Providers of DIP loans usually only lend on a secured basis, meaning they are granted a security interest in the debtor's property, and often lend on a "priming" basis, meaning their security interest has priority over other secured claims.

While a company's bankruptcy case is ongoing, the court must approve all payments and spending by the debtor. Claims submitted by persons and companies who supply services or goods to the debtor after the petition date typically are paid as administrative expense claims. Administrative claims are paid in full as they come due, unlike most pre-filing claims for goods and services, which are not paid until after the debtor emerges from bankruptcy and usually at only a fraction of the amount of the actual claim.

What Is the Role of a Creditors' Committee?

In chapter 11 cases, the United States Trustee typically appoints an Official Committee of Unsecured Creditors comprised of three to seven creditors holding the largest unsecured claims, to represent the interests of all of the unsecured creditors. Creditors with conflicts of interest generally are not appointed to committees.

How Does a Chapter 11 Case End?

For 180 days from the filing of its case, a chapter 11 debtor has the exclusive right to propose a plan of reorganization, or "plan." Along with its plan, the debtor will file a disclosure statement providing details about its business, its bankruptcy filing, how it intends to classify and pay claims and interests, and how it intends to finance its reorganization.

If the court approves the debtor's disclosure statement, creditors vote to approve or reject the plan. A plan approved by creditors must then be confirmed by the bankruptcy court, subject to the conditions of section 1129 of the Bankruptcy Code. Upon confirmation of a chapter 11 plan, the debtor is "discharged" from bankruptcy, meaning that its pre-filing obligations are replaced in their entirety by whatever the plan provides.

Glossary of Bankruptcy Terms

An Overview of Employer Bankruptcy
for Union Employees and Retirees

363 Sale	a sale of assets of the debtor's bankruptcy estate, typically free and clear of liens and claims, pursuant to section 363 of the Bankruptcy Code, that may be for a debtor's entire business or just for certain pieces (such as a factory, or a product line)
Automatic Stay	an injunction automatically imposed on creditors (and others) upon the filing of a bankruptcy case, prohibiting them from taking virtually any action against the debtor or property of the debtor's bankruptcy estate
Bankruptcy Code	Title 11 of the United States Code, the body of law that governs insolvency and reorganization proceedings in the United States
Bankruptcy Court	a division of the United States District Court to which bankruptcy matters are automatically referred
Bankruptcy Estate	the separate legal entity that arises when a bankruptcy case is filed, to which all of the debtor's property belongs during its bankruptcy
Bankruptcy Petition	the document filed to initiate a bankruptcy case
Bankruptcy Rules	the body of rules that governs the procedures to be followed in the bankruptcy court, also known as the Federal Rules of Bankruptcy Procedures
Bar Date	a term commonly used to refer to various dates by which creditors must take certain action. (e.g. the "Claims Bar Date" is the last day to file a proof of claim)
Bond Holders	holders of interest-bearing debt instruments, either secured or unsecured, issued by the debtor
Chapter 7 Liquidation	bankruptcy proceeding in which a trustee collects the assets of the debtor, sells the assets, and distributes the proceeds of the sale of the assets to creditors
Chapter 11 Reorganization	a part of the Bankruptcy Code that provides for a reorganization of the debtor. Under Chapter 11, the debtor the debtors pays its creditors under a payment plan over a period of time in an amount usually not less than the value of the debtor's assets at the commencement of the case
Claim	a right to payment from the bankruptcy estate
Claim, Administrative	a claim generally based on goods or services provided to the bankruptcy estate
Claim, Objection to	refers to the proceeding by which a party disputes a creditor's claim
Claim, Priority	refers to claims that will be paid prior to general unsecured creditors, typically for wages, rents, deposits, and taxes
Claim, Proof of	a written statement evidencing a claim which is filed with the bankruptcy court
Claim, Secured	a claim based on a valid security interest in real or personal property (or both)
Confirmation Hearing	the hearing at which the court determines if it will approve the debtor's plan
Confirmation Order	a court order entered in a chapter 11, 12, or 13 case approving the debtor's plan
Cramdown	a slang term used in the context of a bankruptcy case which refers to the court approving a payment plan over the creditor's objection.

Creditor	an entity that holds a claim
Committee of Creditors	a committee of 3 to 7 of the debtor's unsecured creditors, appointed to represent the interests of all of the unsecured creditors (also known as a Creditors' Committee or Official Committee of Unsecured Creditors, or frequently just Committee)
Debtor	refers to the entity that filed bankruptcy
Debtor-in-possession	a chapter 11 debtor that remains in possession and control of the assets of its bankruptcy estate, with the same rights and duties as a trustee
Defined Benefit Plan	pension plan that guarantees a certain level of retirement income, often based on years of service and historical income level
Discharge	in a chapter 7 case, the elimination of a debtor's debts owed to its creditors in a chapter 11 case, the replacement of a debtor's pre-filing debts with the obligations defined in its plan of reorganization, which occurs at confirmation
Distribution	payment of money or other consideration to the creditors from the bankruptcy estate, sometimes referred to as a dividend
Distribution, priority of	the order in which funds of the bankruptcy estate are distributed
ERISA	Employee Retirement Income Security Act of 1974 (29 U.S.C. §§1001-1461), federal statute that, among other things, created a system of pension insurance and established defined-benefit pension plan sponsors' duties with regard to plan funding
Gap Period	the period of time between the filing of the involuntary petition and the entry of an order for relief, during which the debtor can remain in possession of its property, continue business operations, and use, acquire, or dispose of assets unless these rights are denied by the court or an interim trustee is appointed
Insider	a person, relative, or entity that controls or is presumed to control the debtor
Insolvent	a term used to describe an entity whose liabilities exceed the value of its assets (legal insolvency) or that is not able to pay debts as they come due (equitable insolvency)
Involuntary Petition	the commencement of a bankruptcy case by a debtor's creditors
Lien	an interest in property to secure payment of a debt
Lift-Stay Motion	the procedure by which a creditor seeks court permission to take action against the debtor or the property of the estate (also known as a <i>Motion to Terminate the Automatic Stay</i>)
Motion	a request, usually in writing, directed to the court
NLRA	National Labor Relations Act (29 U.S.C. §§151-169)
Order for Relief	a court order entitling the debtor to the protection of the bankruptcy laws, entered automatically upon the filing of a voluntary bankruptcy petition
PBGC	the Pension Benefit Guaranty Corporation, a government agency that regulates and guarantees ERISA-governed defined benefit pension plans
Petition Date	the date on which the debtor filed its bankruptcy petition

Plan the document that describes the terms and conditions under which
(or **Plan of** creditors in a chapter 11 bankruptcy case are to be paid
Reorganization)

What To Do Upon Learning of an Employer's Bankruptcy (or Impending Bankruptcy)

Upon learning that a company has filed a bankruptcy petition, the Business Agent responsible for the Union's relationship with that employer should

- (1) **Notify Legal.** Contact the Legal Department IMMEDIATELY to avoid missing any bankruptcy court deadlines. The Bankruptcy Rules prescribe deadlines for certain actions, and court orders establish other deadlines. Missing these deadlines can have severe consequences for the Union and its members.
- (2) **Meet With Affected Members.** Meet with groups of Union employees and retirees as soon as possible after the filing or impending filing becomes known. It is important to reassure members and advise them not to panic, especially in bankruptcies of high-profile employers receiving substantial media attention. Most importantly, *remind them that this is why they chose to organize in the first place*—rather than being forced to fight for their own interests, workers can go about their day knowing that the Union is looking out for them.
- (3) **Determine Members' Claims and Interests.** Union members frequently will have claims against their employers in bankruptcy, and Union counsel must file a Proof of Claim on behalf of such members to protect their rights. Assess the existence and status of outstanding grievance proceedings and ULP charges as soon as possible after the filing—this will be among the first things counsel needs.
- (4) **Maintain the Flow of Information to Members.** Nothing is more unsettling than uncertainty. Keep members apprised (by whatever means are most effective and efficient for each group of workers) of the status of important issues in the bankruptcy case. Union counsel can provide summary information for inclusion if needed. Most importantly, an open flow of information reminds members that the Union is actively participating in the bankruptcy proceeding and that its members will be afforded all available legal protections.
- (5) **Avoid Hyperbole in Public Statements.** Any statements to the press should indicate only that the Union is working with the debtor to give it the full opportunity to successfully reorganize and assure that members are treated fairly. While the Union is willing to go to bat for its members when necessary, it is important that the public see our unified, positive, and constructive attitude.
- (6) **Help Members Protect Their Interests.** Union members chose to organize to obtain a unified voice in negotiations with management, and there is no context where the Union's role becomes more important than in an employer's bankruptcy. After notifying Legal and meeting with members as a group, the business agent should:
 - establish a website or telephone hotline to answer members' questions about claims;
 - create and maintain a single list of all members and the status of their proofs of claim to enable the Business Agent (or an appropriate designee, such as the shop Steward) to follow up and ensure claims are filed timely;

- distribute proof of claim forms to shop Stewards to keep on hand for members, along with a one-page checklist of the filing instructions and bar date;
- ensure that members with priority claims identify those claims appropriately, as priority claims are generally paid ahead of unsecured claims;
- verify that the employer's post-filing obligations to the Union, its members, and any benefits trusts are current and, if not, contact the Legal Department immediately. Do not take any direct collection action, including sending dunning letters.

(7) **Consider Serving on the Creditors' Committee.** Determine whether it is in the interests of the union to serve on the Official Committee of Unsecured Creditors. Committee service involves minimal additional expenditure of time or money and gives the Union direct input into the reorganization process and better access to information.

Documents to Request

Upon learning that a company has filed a bankruptcy petition, the Business Agent of the Union Local representing workers under a collective bargaining agreement should ask the employer for the following information:

- (1) A list of current employees with information regarding the age, seniority, job title, shift and hourly rate of all employees covered by the union's collective bargaining agreement with the company.
- (2) Copies of all orders relating to employee wages and benefits, insurance, and funding of operating expenses (particularly employee related expenses). These will typically be entered by the court following a "first-day" hearing at the very outset of the case.
- (3) All information needed to file proofs of claim, including the proof of claim form, the filing address, and any DEADLINES imposed by the court in a Bar Date Order.
- (4) All debtor-in-possession (DIP) and cash collateral budgets, to confirm that all post bankruptcy member and union obligations are included for payment.