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Congress Passes Multiemployer Pension Reform

The House and Senate passed a \$1.1 trillion spending bill (H.R. 83, the [Consolidated and Further Continuing Appropriations Act](#)) to fund most federal operations through September 2015. The spending bill includes new multiemployer pension provisions, known as the Multiemployer Pension Reform Act of 2014 (the "Act"). President Obama is expected to sign the bill into law.

The Act permanently extends the Pension Protection Act of 2006 ("PPA") multiemployer plan critical and endangered status funding rules that had been scheduled to sunset at the end of 2014. It also includes a series of technical corrections and enhancements to the PPA funding rules, including significant new reforms that allow the trustees of multiemployer plans facing insolvency to apply to the Pension Benefit Guaranty Corporation ("PBGC") for a suspension of benefits. In addition, the Act gives the PBGC greater flexibility in facilitating plan mergers and approving plan partitions.

Below, we provide an overview of each of these provisions, and address key questions regarding the relief made available by the Act.

Amendments to the Pension Protection Act

The Act makes the following amendments to the PPA critical and endangered status funding rules:

- **Election to Enter Critical Status Early.** The plan sponsor of a plan that is not yet in critical status but is projected by the plan actuary to be in critical status in any of the next 5 plan years may elect to be in critical status for the current plan year. The act includes changes to the actuarial projection requirements and new notice requirements that apply to the new elections.
- **Clarification of Rules for Emergence from Critical Status.** The Act clarifies how the tests applicable to plans emerging from critical status apply so that there is not a "revolving door" under which plans emerge from critical status in one plan year only to reenter critical status the following year. To emerge from critical status, a plan generally must not trigger any of the critical status entry triggers, must not be projected to have a funding deficiency for the plan year and succeeding 9 plan years (taking into account any extension of amortization periods as in effect prior to PPA), and not be projected to become insolvent within the succeeding 30 plan years. In the case of a plan with an automatic extension of amortization periods under ERISA section 304(d)(1), the plan may still emerge from critical status even if it still triggers any of the critical status entry triggers if it satisfies the other two emergence requirements (taking into account any extension of amortization periods) and only

reenters critical status if it no longer satisfies those two emergence requirements.

- **Endangered Status Rules Not Applicable if No Action is Required.** A plan is not considered to be in “endangered status” if the plan is projected no longer to be in endangered status as of the end of the tenth plan year ending after the plan year of the actuary’s certification without any further action (*e.g.*, without increasing contribution rates or decreasing benefit accruals).
- **Timing of Endangered Status Funding Improvement Plan Target Percentage.** The Act modifies the process for determining the target funded percentage applicable to funding improvement plans so that it is based on the plan’s funded percentage at the time of the certification of endangered status rather than the projected percentage at the start of the funding improvement period.
- **Conforming Critical and Endangered Status Adoption Period Rules.** The Act modifies the rules that apply to endangered status plans during the plan adoption and funding improvement periods with respect to benefit improvements and contribution decreases to make them consistent with the rules that apply to critical status plans.
- **Default Schedules When Collective Bargaining Parties Fail to Adopt.** The Act provides that if a collective bargaining agreement (CBA) that was adopted pursuant to a funding improvement plan or rehabilitation plan expires while the plan is still in endangered status or critical status and the bargaining parties fail to reach an agreement on a new contribution schedule that is consistent with the funding improvement plan or rehabilitation plan, the contribution schedule under the expired CBA applies.
- **Repeal of Reorganization Rules.** The Act repeals the reorganization rules and makes conforming amendments to the insolvency rules.
- **Certain Contributions Disregarded for Withdrawal Liability Purposes.** The Act provides that the PPA surcharge applicable to multiemployer plans in critical status is disregarded when determining the highest contribution rate for purposes of calculating a withdrawing employer’s withdrawal liability periodic payment amount. In addition, any increases in the contribution rate or any other increase in contribution requirements (unless due to increased levels of work, employment, or periods for which compensation is provided) required under a funding improvement plan or rehabilitation plan are similarly disregarded. Once the plan emerges from endangered or critical status, such contribution increases are taken into account for withdrawal liability calculation purposes except in determining the highest contribution rate for plan years during which the plan was in endangered or critical status. The changes made by this amendment apply only to benefit reductions and contribution rate increases that go into effect for plan years starting after December 31, 2014 and to surcharges the obligation for which accrue on or after December 31, 2014.
- **QPSA Guarantees.** The Act guarantees that qualified pre-retirement survivor annuities (“QPSAs”) will be paid to the surviving spouse of a multiemployer plan participant who dies after the plan has become insolvent or is terminated, which is consistent with the rules applicable to single-employer plans.
- **Expanded Disclosure Requirements.** The Act expands the types of information that must be disclosed upon the written request of participants, beneficiaries, employee representatives and contributing employers.

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Benefit Suspensions for Plans in Critical and Declining Status

The Act allows troubled multiemployer plans meeting certain qualifications to apply for permission to suspend benefits in order to avoid insolvency. To be eligible, a plan must be in “critical and declining status,” a newly-created designation applicable to critical status plans that are projected to become insolvent anytime in the current plan year or during the next 14 plan years. Additionally, a plan will qualify for critical and declining status if the plan is projected to become insolvent within the next 19 plan years and either the plan’s ratio of inactive participants to active participants exceeds 2 to 1, or the plan’s funded percentage is less than 80%.

Plan sponsors of critical and declining status plans may apply to suspend benefits for participants in pay status and accrued benefits for participants not in pay status. There is no liability to the plan for suspended benefits, and the suspensions may remain in effect until the plan sponsor provides benefit improvements or the suspension expires by its terms. For plans with more than 10,000 participants, the plan must appoint a retiree representative (who can be a trustee) not later than 60 days prior to submitting an application.

The suspensions must be projected to allow the plan to remain solvent, and will not be permitted unless the plan sponsor has taken (and continues to take) all reasonable measures to avoid insolvency. Suspensions must be distributed equitably across all participants (taking into account certain factors) and cannot reduce benefits below 110% of the PBGC guarantee level. The suspensions, in the aggregate, must be reasonably estimated to achieve, but not materially exceed, the level necessary to allow the plan to stay solvent. Neither benefits attributable to disability nor benefits of participants and beneficiaries who are 80 years or older can be suspended. Restrictions also apply to suspensions of benefits for participants or beneficiaries who are 75 to 79 years old. Special benefit suspension ordering rules apply in the case of benefits that are attributable to a participant’s service with an employer that has withdrawn in a complete withdrawal and paid the full amount of the employer’s withdrawal liability and assumed liability for providing benefits to participants and beneficiaries under a separate single-employer plan.

Plan sponsors must apply to the Treasury Department for approval of benefit suspensions based on whether the plan meets the limitations and conditions specified above. Treasury must consult with the Department of Labor (“DOL”) and the PBGC with respect to the application and must publish a notice in the Federal Register soliciting comments no later than 30 days after receipt of the application. Concurrently with submitting the application, the plan sponsor must provide a notice containing certain information to participants, beneficiaries, employee representatives and contributing employers. Treasury must either approve or deny the suspension within 225 days from the date of receipt of an application. If Treasury fails to act within that timeframe, the application is deemed approved. If Treasury approves the suspension, it must then administer a ratification vote within 30 days of the approval under which the suspension will go into effect unless a majority of all participants and beneficiaries vote to reject the suspension. The plan sponsor may submit a new application if a negative vote occurs. However, if a plan is deemed “systemically important” (meaning that the present value of projected PBGC assistance payments if suspensions do not occur exceeds \$1 billion), Treasury may override a vote that rejects the suspension. If Treasury overrides the vote, Treasury has the authority to modify the suspensions described in the plan sponsor’s application.

While suspensions are in effect, plans may only improve benefits for participants not in pay status, if benefits are improved equitably for participants who previously entered pay status and the plan actuary certifies that the plan is projected to avoid insolvency indefinitely. The projected value of total liabilities for benefit improvements for participants and beneficiaries not in pay status may not exceed the projected value of the liabilities from benefit improvements for participants and beneficiaries in pay status. Benefit improvements for participants must be equitably distributed to some or all participants in pay status taking into account certain factors, and the extent to

which the benefits of the participants were suspended. The plan sponsor may resume benefits for participants in pay status only if the sponsor equitably distributes the value of resumed benefits to some or all participants and beneficiaries in pay status, taking into account certain factors. Benefit improvements for participants not in pay status are permitted if they are reasonable and result in only de minimis increases in liabilities (or are required for qualification).

Liabilities with respect to suspended benefits will continue to be included in estimates of a withdrawing employer's withdrawal liability, unless the withdrawal occurs more than ten years after the effective date of a benefit suspension.

Plan Partitions

The Act overhauls the existing partition rules applicable to multiemployer plans. Under prior law, partition was only available with respect to the vested benefits directly attributable to a bankrupt employer. Under the Act, the availability of a partition is no longer limited to benefits attributable to a bankrupt employer. Instead, a plan requesting a partition must be in critical and declining status (*i.e.*, projected to become insolvent within 15 years or 20 years in certain cases). In addition, the plan sponsor must have taken (or be taking concurrently with the partition application) all reasonable measures to avoid insolvency, including the maximum benefit suspensions permitted under the new Act provisions. Under the benefit suspension rules, the effective date of any suspension made in combination with a partition may not take effect before the effective date of the partition.

In reviewing a partition application, the PBGC reviews factors that are similar to the factors under prior law. Under the Act, the PBGC must reasonably expect that the partition will reduce PBGC's expected long-term loss with respect to the plan and that partition is necessary for the plan to remain solvent. If the PBGC makes these findings, it must certify to Congress that its ability to pay guaranteed benefits for other plans (including plans projected to become insolvent within 10 years) will not be impaired by the partition. If PBGC pays any costs for the partition, those amounts must be paid from PBGC's multiemployer benefit fund.

Upon filing an application for partition, the plan must notify all participants and beneficiaries of the request within 30 days. The PBGC is obligated to make a determination regarding the application within 270 days from the date the application is submitted.

If PBGC approves the partition, the order must provide that the partitioned plan (the "Old Plan") transfers liabilities to the plan created by the partition (the "New Plan"). The liabilities transferred into the New Plan cannot be more than what is necessary to keep the Old Plan solvent. The New Plan is a successor plan that will pay benefits guaranteed by the PBGC, and must be sponsored and administered by the same entities that did so before the partition.

After the partition, the Old Plan must pay a monthly benefit to each partitioned participant and beneficiary for each month the benefit is in pay status in the amount by which the benefit that would be paid under the plan terms (taking into account any benefit suspensions and any post-partition plan amendments) exceeds the PBGC's guaranteed benefit amount for that person.

Additional rules apply for the ten-year period following the partition date. In that ten-year period, the Old Plan that was partitioned must pay PBGC premiums with respect to participants whose benefits were partitioned to the New Plan. In addition, if the Old Plan improves benefits in the ten-year period following the partition, the Old Plan must

pay to the PBGC an amount equal to the lesser of (1) the total value of the increase in payments for the year that is attributable to the benefit improvement; or (2) the New Plan's total benefit payments for the year.

If an employer withdraws from the Old Plan within ten years of the partition, special withdrawal liability calculation rules apply under which withdrawal liability will be calculated with respect to both the Old Plan and the New Plan. If an employer withdraws from the Old Plan beyond the ten-year period, the withdrawal liability is only calculated with respect to the Old Plan.

Plan Mergers

The Act also expands PBGC's tools to facilitate mergers between multiemployer plans. If a plan sponsor requests that the PBGC facilitate a merger with another plan, the PBGC may provide help if it determines that (1) the transaction is in the interest of the participants and beneficiaries of at least one of the plans, and (2) is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. The PBGC may provide training, technical assistance, mediation, communication with stakeholders, and support with related requests to other governmental agencies.

The PBGC may also provide financial assistance to facilitate a merger if –

- 1) One or more of the plans involved in the merger is in critical and declining status;
- 2) PBGC reasonably expects that the financial assistance is necessary for the merged plan to become or remain solvent;
- 3) PBGC reasonably expects that financial assistance will reduce PBGC's expected long-term loss with respect to the plans involved;
- 4) PBGC certifies its ability to meet existing financial obligations will not be impaired by providing the financial assistance; and
- 5) The assistance is paid from the PBGC's multiemployer benefit fund.