Congress Finalizes COVID-19 Legislation With Health, Tax, and Retirement Changes

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On March 10, 2021, the House of Representatives passed the version of the American Rescue Plan Act (H.R. 1319, the "Act") previously passed by the Senate on March 6. President Biden is expected to sign the legislation on Friday. The Act is intended to, among other things, provide financial support to families struggling because of the pandemic, including a third round of stimulus checks for individuals (up to certain income limits), temporary COBRA and Affordable Care Act ("ACA") subsidies intended to help people maintain health insurance coverage during the pandemic, and funding for COVID-19 vaccines and testing. The Act also includes a number of other tax and retirement provisions, including extended funding stabilization for single-employer pension plans, financial assistance for certain multiemployer pension plans, and changes to the executive compensation rules. Below, we summarize the key health, tax, and retirement provisions in the Act.

I. Health Provisions

A. COBRA Subsidies

The Act includes a temporary 100% COBRA subsidy for COBRA qualified beneficiaries where the qualifying event was an involuntary termination of employment or reduction in hours. The House had originally passed an 85%

subsidy that was increased to 100% in the Senate. The subsidy applies to an "assistance eligible individual," which appears to include both an employee and dependents who had elected or will elect COBRA. The 100% subsidy is based on a COBRA premium that includes the 2% administrative fee that health plans are permitted to charge for COBRA. The assistance eligible individual does not pay the COBRA premium, but rather the premium initially is "advanced" by the employer, plan, or insurer and then reimbursed by the government through a refundable tax credit (against Medicare hospital insurance (HI) taxes).

The Act provides that, for an insured or self-funded plan, the employer applies for the tax credit. For a multiemployer plan, the plan applies for the tax credit. The original legislation reported out of the Ways and Means and Education and Labor Committees had provided that the tax credit would be claimed by the employer for self-insured coverage and the insurer for insured coverage. This division could have delayed an employer with an insured plan from receiving proceeds from the credit because the insurer was the only entity that could claim the tax credit. A Manager's Amendment passed by the House and incorporated into the House-passed Rescue Plan addressed this issue by changing the language so that the *employer* is the entity that claims the tax credit for both insured and self-funded coverage where the employer's group health plan is subject to COBRA under the Code, ERISA, or the PHSA (similar to the ARRA COBRA subsidy provisions from 2009). The Senate adopted this change as well.

The subsidy will begin for coverage periods beginning on April 1, 2021 and ending on September 30, 2021. The subsidy would end sooner if the qualified beneficiary's maximum COBRA coverage period ends or if the individual is eligible for another group health plan or Medicare.

The Act also provides additional enrollment options for individuals who already had an involuntary termination of employment or reduction in hours within the last 18 months and did not timely elect COBRA or dropped COBRA. These individuals have a new 60-day election period following the date that they receive a new required COBRA notice. Additionally, employers are permitted to allow assistance-eligible individuals to change elections to other plan options that have the same or lower cost premiums (this is optional).

The Act requires employers to update COBRA notices sent to assistance eligible individuals to describe the subsidy and to issue extended COBRA election notices within 60 days of the date of applicability. Failure to do so is treated as a failure of the COBRA notice requirements. Employers also must provide a notice of expiration before the premium subsidy expires. The legislation sets out content for these notices and directs the Secretary of Labor to publish Model Notices.

B. Affordable Care Act Subsidies

The Act makes significant but temporary changes to the existing ACA premium subsidies. For 2021 and 2022, the Act eliminates the upper income limit for eligibility for premium tax credits, which is currently set at 400% of the federal poverty level, and increases the amount of the premium tax credits by decreasing the amount that an individual must contribute to the cost of coverage. While the income limit increase expands the availability of subsidies to many more households, the Act contains a requirement that individuals contribute a percentage of their income toward coverage. Under the Act, this percentage is set at 8.5% of household income for those with incomes of 400% of the federal poverty level or more, meaning that the more an individual makes, the more that individual will be expected to contribute toward the cost of coverage. Additionally, because the amount of premium tax credits available will vary based on the cost of coverage, there will be a level of income at which the individual's required contribution will exceed the cost of coverage, and no premium tax credit will be available.

The Act also provides special support for individuals who receive unemployment compensation. For 2021, a taxpayer who receives or is approved to receive unemployment compensation for a week or more is treated as eligible for premium subsidies and any income above 133% of the federal poverty level is disregarded for purposes of determining the contribution percentage the taxpayer must contribute toward coverage. Because the contribution level for incomes up to 150% of the federal poverty level is zero under the Act, an individual who received unemployment compensation is not be expected to contribute toward the cost of subsidy-eligible coverage. The Act also suspends repayment of excess subsidies for 2020.

II. FSAs & Tax Credits

A. Employee Retention Credit.

The legislation extends the availability of the CARES Act's employee retention credit an additional two quarters, from July 1, 2021 to December 31, 2021. After June 30, 2021, the credit applies against an employer's Medicare hospital insurance (HI) taxes rather than Social Security Old Age, Survivor's, and Disability Insurance (OASDI) taxes. The credit continues to be refundable for employers with insufficient tax liability. The Consolidated Appropriations Act ("CAA") enacted in December 2020 had previously extended the ERTC through June 30, 2021, increased the credit percentage from 50% to 70%, increased the per employee limit on qualifying wages to $10,000 per quarter, and expanded the eligibility of qualifying employers.

B. Credits for Paid Sick and Family Leave

The Act also extends the availability of the refundable paid sick leave and family and medical leave credits through September 30, 2021. After March 31, 2021, changes to the credits include increasing the maximum amount of wages used to calculate the credit, increasing the maximum number of sick days an employer can count for the credit, and allowing leave for COVID vaccinations to count for the credit. Like the employee retention credit, after March 31, 2021, the credit applies against an employer's HI taxes instead of OASDI taxes. The obligation to provide paid leave remains voluntary, as it was under the CAA that extended the paid sick and family leave credits – but not the employer mandate – through March 31, 2021.

C. Dependent Care FSAs

The legislation increases the dependent care FSA limit for 2021 from $5,000 to $10,500 (from $2,500 to $5,250 for married filing single). An employer can amend its cafeteria plan retroactively to adopt this increased limit, as long as it amends the plan by the end of the plan year and operates consistently with the amendment.

III. Retirement Provisions

The Act includes broadly available funding rule changes for single-employer and multiemployer pension plans and significant financial assistance to deeply underfunded multiemployer pension plans. It also increases the premiums payable to the Pension Benefit Guaranty Corporation ("PBGC") by multiemployer plans effective for plan years beginning after 2030. The pension funding provisions are similar to provisions in the HEROES Act (H.R. 6800, 116th Congress) passed by the House of Representatives on May 15, 2020. The provisions providing financial assistance to deeply underfunded multiemployer pension plans are similar to those in the Emergency Pension Plan Relief Act of 2021 (H.R. 409 introduced by House Ways and Means Committee Chairman Richard Neal (D-MA), H.R. 423 introduced by House Education and Labor Committee Chairman Bobby Scott (D-VA) and S. 547 introduced by Senator Sherrod Brown (D-OH)).

A. Single-Employer Pension Funding Changes

The Act provides that, in the 2022 plan year, the minimum funding requirements for single-employer pension plans will be calculated by amortizing the entire unfunded liability over 15 years. Re-amortizing the unfunded liability in this fashion is often referred to as a "fresh start". A 15-year amortization period will also apply to future changes in the unfunded liability (as opposed to the 7-year period that applies under current law). Plan sponsors may alternatively elect to apply these changes beginning with their 2019, 2020, or 2021 plan years.

The Act extends and enhances the interest rate stabilization provisions that were first introduced in MAP-21, and which would start to be phased-out in 2021 under current law. This includes (1) providing an updated corridor for the 25-year average interest rate and (2) setting a 5% minimum for the 25-year average. These two relief provisions are generally effective for plan years beginning after December 31, 2019, but a plan sponsor may choose to disregard these two aspects of the funding relief for years prior to 2022 – either for all plan purposes or just for purposes of the benefit restrictions under Code section 436. A plan may prefer to disregard the relief, in whole or in part, to avoid the need to make retroactive corrections.

The following table summarizes the stabilization corridor under prior law and under the Act. Note that a narrower corridor has a larger impact on the interest rate used to determine the plan liabilities.

Current Corridor			Proposed Corridor	
Year	Minimum	Maximum	Minimum	Maximum
2020	90%	110%	95%	105%
2021	85%	115%	95%	105%
2022	80%	120%	95%	105%
2023	75%	125%	95%	105%
2024	70%	130%	95%	105%
2025	70%	130%	95%	105%
2026	70%	130%	90%	110%
2027	70%	130%	85%	115%
2028	70%	130%	80%	120%
2029	70%	130%	75%	125%
2030+	70%	130%	70%	130%

To illustrate the impact of these changes, if the 25-year average of the 3rd segment rate for 2020 were to be 4%, then under current law the lower boundary of this segment rate for minimum funding purposes would be 90% of 4%, or 3.6%. Under the Act, a 5% floor applies to the 25-year average rate and the lower boundary is 95% of that rate, resulting in a rate of 4.75% for minimum funding purposes. The Joint Committee on Taxation estimates that the single-employer pension changes would raise nearly $23 billion in revenue over the 10-year budget period.

The Act modifies the definition of "community newspaper employer" to allow additional plan sponsors to qualify for the special funding rules for community newspapers enacted as part of the Setting Every Community Up for Retirement Enhancement Act of 2019. Community newspaper employers are permitted to elect to amortize their pension underfunding over 30 years and calculate plan liabilities using an 8% interest rate.

B. Multiemployer Pension Provisions

For one plan year that begins on or after March 1, 2020 and before March 1, 2022, the Act allows an election to maintain the same zone status that was certified for the preceding plan year. Plans are similarly not required to update their funding improvement or rehabilitation plans for this plan year. The effect of this provision is to allow a delay before plans must take steps to offset losses incurred during the COVID-19 pandemic. Plans in critical or endangered status may also elect to extend their funding improvement or rehabilitation plans by 5 years, allowing additional time for them to achieve their funding targets.

Under the Act, plans may amortize their investment and other COVID-19 related losses incurred in either or both of the first two plan years ending after February 29, 2020 over a 30-year period, as opposed to the 15-year period that normally applies. For these two plan years, plans may also change their asset valuation methods to spread investment losses over 10 years and may allow the smoothed actuarial value of assets to exceed the fair market value by 30%. Normally the smoothed actuarial value of assets is subject to a 5-year limit on the recognition period and a 20% corridor around the fair market value of assets. Plans electing this relief must pass a solvency test and are subject to restrictions on improving benefits.

C. Financial Assistance for Certain Multiemployer Pension Plans

Under the Act, the PBGC will provide special financial assistance to highly distressed multiemployer pension plans that meet certain criteria. Specifically, in order to be eligible for this assistance a multiemployer plan must satisfy one or more of the following criteria:

- Is in critical and declining status for any plan year from 2020 through 2022, generally indicating that the plan is expected to exhaust its assets in 20 years or less.
- Has previously reduced benefits under the provisions of the Multiemployer Pension Reform Act of 2014 ("MPRA").
- Is in critical status for any plan year from 2020 through 2022, with a ratio of assets to liabilities (determined on a very conservative basis) of 40% or less, and a ratio of active to inactive participants of less than 2 to 3.[1]
- Became insolvent after December 14, 2014 but is not terminated (*i.e.*, fully frozen).

Special financial assistance is paid to plans as single lump sums, with the amounts determined such that the plans are projected to remain solvent through their 2051 plan years. The Act specifies that deterministic projections should be used for this purpose. The amount of special financial assistance is determined without regard to whether benefits are above or below the PBGC maximum guarantee level.

The special financial assistance payable under the Act is supported by the general fund of the U.S. Treasury and will be paid through a new eighth fund within the PBGC. This differs from the existing multiemployer financial assistance provided by PBGC, which is entirely supported by premiums paid by the plans themselves. In contrast with the financial assistance that PBGC pays to insolvent multiemployer plans under current law, the special financial assistance under the Act is not subject to any repayment provisions.

PBGC is required to publish regulations implementing the Act within 120 days of enactment. The Act provides PBGC with the authority to prioritize applications from multiemployer plans that are within 5 years of failure, have unfunded liabilities eligible for guarantee by PBGC in excess of $1 billion, or have previously reduced participant benefits under MPRA. PBGC may restrict applications to only priority plans during the 2-year period following enactment of the Act and may establish additional criteria for identifying priority plans.

In calculating the amount of financial assistance a plan will receive in order to remain solvent until 2051, asset returns must generally be projected using the lesser of (a) the interest rate assumed by the plan actuary for the 2020 plan year or (b) the third segment rate from the single-employer funding rules (without regard to the 25-year average corridor) plus 200 basis points. The third segment rate from the single-employer funding rules plus 200 basis points currently results in an interest rate of 5.59%. The other actuarial assumptions will generally be the same as those used by the plan actuary for the 2020 plan year unless the plan proposes the use of different assumptions and PBGC, in consultation with the Department of Treasury, accepts the change.

The deadline for plans to apply for special financial assistance is December 31, 2025, with an extended deadline of December 31, 2026 available to plans submitting revised applications. PBGC generally has 120 days to review an application, after which the application will be deemed to be approved if PBGC has not acted on it.

The Act provides that any plan receiving special financial assistance must reinstate any benefits that were reduced under the benefit suspension provisions of MPRA. This reinstatement applies prospectively, and also includes back payments for previously suspended benefits.

Plans must segregate the special financial assistance received under the Act from other plan assets and may only invest the financial assistance in investment grade bonds unless PBGC permits other investments. Subject to certain limitations, PBGC may impose conditions on plans that receive financial assistance, and such plans are deemed to be in critical status through the 2051 plan year. The financial assistance provided by the Act is disregarded when determining plans' minimum funding requirements.

D. Multiemployer PBGC Premiums

The Act increases the PBGC premium rate for multiemployer pension plans to $52 per participant, effective for plan years beginning after December 31, 2030. This premium rate is indexed for inflation for years after 2031.

E. Executive Compensation

For taxable years beginning after 2026, the Act expands the number of employees subject to Code section 162(m). Under current law, publicly traded employers are prohibited from taking a deduction for executive compensation in excess of $1 million paid to the chief executive officer, chief financial officer, and the next three highest compensated employees (each a "Covered Employee"). In addition, current law provides a rule colloquially expressed as "once a Covered Employee, always a Covered Employee." The Act adds five additional employees to the list, expanding to eight the number of the highest compensated employees beyond the CEO and CFO for whom certain compensation cannot be deducted. However, the five additional employees added by the Act are not subject to the "once in, always in" rule applicable to Covered Employees under current law.

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[1] The liability measurement for this purpose is called current liability, which uses a discount rate based on 30-year Treasury securities that is below 2.5% as of the beginning of 2021.