Legal Update Article

Will American Rescue Plan Act Multiemployer Pension Provisions Bring Relief to Employers?

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The American Rescue Plan Act of 2021includes a modified version of the Butch Lewis Act, referred to as the Emergency Pension Plan Relief Act of 2021 (EPPRA), which restores to financial health more than 100 failing multiemployer pension plans. However, the measure falls well short of any meaningful long-term funding reform.

EPPRA is the result of a protracted attempt (including multiple proposals from both sides of the aisle) to address the multiemployer pension plan funding crisis. The Democrats have long-pursued direct government financial assistance to plans, while Republicans have focused on a new premium structure and copayments from stakeholders such as active employees and most retirees. Now that EPPRA is the law of the land, employers want and need to know how EPPRA will affect employer obligations for both contributions and withdrawal liability.

Withdrawal liability is a statutory liability created by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). Under MPPAA, each contributing employer who exits a multiemployer pension plan under circumstances constituting a "withdrawal" is allocated a share of the plan's unfunded vested benefits (UVBs). UVBs represent the excess of a plan's liabilities for earned benefits over the value of the plan's assets. Withdrawal liability is a contingent (or potential) liability that is generally not triggered until an employer partially or completely exits the plan through a complete or a partial withdrawal.

A combination of the 2008-2009 economic recession, the deregulation and consolidation of certain heavily unionized industries, and an overall demographic shift away from unionized labor has resulted in many, if not most, multiemployer pension plans being underfunded. Exiting these plans has become cost-prohibitive for most employers. The Pension Protection Act of 2006 generally exacerbated the problem for most employers, increasing contribution levels and employer surcharges. Accordingly, for many employers, it has become expensive to stay in these underfunded plans, but too expensive (therefore, impossible) to exit them.

Under EPPRA, Congress allocated funds in "such amount required for the plan to pay all benefits due" until the last day of the plan year ending in *2051.* A qualifying multiemployer pension plan "shall not be subject to repayment obligations with respect to" this "special financial assistance." While there is no specific amount appropriated under the new law, pre-enactment projections estimate expenditures to qualifying plans of approximately $86 billion. Qualifying plans include multiemployer plans that are:

1. Insolvent;
2. Projected to become insolvent;
3. Approved by the Treasury to suspend benefits; or
4. Have a modified funded percentage of less than 40% and significantly more retirees than active participants.

It is estimated that approximately 185 multiemployer plans may be eligible for assistance.

This extensive financial assistance will fully fund all vested benefits (and reinstate benefits previously suspended under the Multiemployer Pension Reform Act or MPRA) for 30 years. Because EPPRA permits the Pension Benefit Guaranty Corporation (PBGC) to prioritize financial assistance to plans that satisfy certain criteria, many expect some of the largest and most significantly underfunded plans to receive substantial financial assistance soon.

For example, the Central States, Southeast and Southwest Areas Pension Plan is projected to become insolvent in the next five years. Central States is expected to be eligible for substantial assistance (estimated by some as exceeding $40 billion) to address its funding shortfalls.

Since withdrawal liability represents the excess of the plan's liabilities over its assets, some employers may expect that this massive influx of cash would reduce or eliminate their withdrawal liability. As of this date, however, the impact of EPPRA on an employer's ultimate liability is unclear. The law as originally passed by the House of Representatives expressly excluded any financial assistance from the withdrawal liability calculus for a period of 15 years. However, this fund-friendly provision was struck from the bill during the Senate approval process and was not in the bill signed by President Joe Biden. In other words, under current law (*e.g.,* EPPRA) and in the absence of anticipated regulations, an employer's withdrawal liability could potentially be reduced or eliminated in its entirety. Unfortunately for employers, however, there is a catch.

Under EPPRA, PBGC is authorized to "impose, by regulation or other guidance, reasonable conditions on an eligible multiemployer plan that receives special assistance relating" to both "reductions in employer contribution rates" and "withdrawal liability." The 15-year provision and the broad and express regulatory authority granted to PBGC by the statute has many practitioners (including the authors) expecting that PBGC will issue guidance similar to the excised provision. The most likely scenario is that an employer's withdrawal liability will be calculated without regard to any EPPRA "special financial assistance" for a period of 15 years (consistent with the excised provision) or 10 years (the period for which MPRA benefit suspensions are disregarded for withdrawal liability purposes under ERISA Section 305(g)). Until PBGC issues this much-needed guidance, the exact impact of EPPRA on employers will be unknown.

Further, under EPPRA, the interest rate used to calculate withdrawal liability for plans receiving assistance is limited. The interest rate used to calculate withdrawal liability would be capped, in part, by subsections of ERISA, plus 2%, which would currently be approximately 5%. Of course, the lower the interest rate used by a plan for this purpose, the higher the resulting employer withdrawal liability.

Importantly, less than 15% of the 1,400 multiemployer pension plans will receive financial assistance. Accordingly, the bulk of employer obligations to multiemployer plans, even those that are significantly underfunded, will be unaffected by EPPRA. With respect to employers who contribute to plans that receive EPPRA assistance, PBGC is expected to issue guidance that would limit (in whole or in part) the benefit of such assistance to employers.

The impact of EPPRA's special financial assistance on contributing employers will largely depend on PBGC regulations and guidance. Employers who are currently confronted with an immediate decision regarding withdrawal from a multiemployer pension plan (for example, employers in the middle of labor negotiations) likely will need to exercise patience pending the issuance of PBGC guidance.

We will continue to monitor and report on the impact of EPPRA and associated regulations impact on contributing employers. Please reach out to the authors if you have questions or need assistance.

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