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Is relief for the plight of multiemployer pension plans in the works?

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I. OVERVIEW OF THE BUTCH LEWIS EMERGENCY PENSION PLAN RELIEF ACT

On March 11, 2021, President Joe Biden signed the much-heralded American Rescue Plan Act of 2021 (ARP) into law,[1] enacting the Butch Lewis Emergency Pension Plan Relief Act of 2021 (EPPRA).

The EPPRA addresses multiemployer and single-employer pension plans in the wake of COVID-19 and attempts to tackle the rampant underfunding of multiemployer pension plans that predates the pandemic by several decades.

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Congress has been cognizant of the extreme underfunding of multiemployer funds for years. As the Central States Pension Fund revealed in 2017, Baby Boomers retiring in record numbers coupled with the steady decline of the union workforce resulted in an annual shortfall of $2 billion. The 2008 economic recession exacerbated this underfunding problem by causing numerous contributing employers to declare bankruptcy, the union said.[2]

Recognizing the problem, Congress passed several significant pieces of legislation beginning with the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which created the concept of withdrawal liability and a contributing employer's responsibility.

Other legislation passed in the succeeding 40 years included the Pension Protection Act of 2006 (PPA), which was intended to bring transparency to the status of pension funds. PPA permitted funds to eliminate adjustable benefits.

The 2008 recession created additional underfunding problems. Most alarmingly, the value of funds' portfolios declined significantly. By passing the Kline-Miller Multiemployer Pension Reform Act of 2014 (MPRA), Congress sought to aid struggling multiemployer pension plans by establishing a new process for plans designated as "critical and declining" to stabilize by reducing core benefits.

A fund was required to submit an application to the Treasury accompanied by voluminous studies and reports. If Treasury approved the application, it would be opened to a vote of participants of the fund. If supported by the participants, a fund could reduce core benefits.

In light of this history, many critics of the EPPRA stated that it is simply a bail out to pension plans under the guise of pandemic relief.

Unfortunately, the EPPRA offers no immediate benefit for employers. Rather, the legislation provides several forms of temporary relief to struggling multiemployer plans, including:

(1) Retention of a plan's zone status at the beginning of the 2019 plan year for the plan years beginning in 2020 or 2021 (meaning that plans in "endangered or critical status" could delay updating the plan or schedules until the plan year beginning March 1, 2021);

(2) Extension of rehabilitation period by five years for plans in "endangered or critical status" for plan years beginning in 2020 or 2021 (effective for plan years beginning after December 31, 2019);

(3) Permission for plans to use a 30-year amortization base to spread out losses (effective for plan years ending on or after February 29, 2020); and

(4) Freeze of the cost of living adjustment.

These aspects of the EPPRA provide the funds with additional "tools" to further stave off insolvency.

More substantial relief comes in the form of promises to provide additional funding to multiemployer pension plans. Under the Special Financial Assistance Program for Financially Troubled Multiemployer Pension Plans, a portion of the EPPRA, monies will be provided to aid approximately 10 million Americans that participate in multiemployer pension plans, 1.3 million of whom are stuck in quickly sinking plans.

(1) What does the Special Financial Assistance Program do? Through this program, the Pension Benefit Guaranty

Corporation (PBGC) will send payments *directly* to eligible multiemployer pension plans. However, it also would raise the PBGC multiemployer plans premium rate to $52 per participant as of 2031.

(2) Which multiemployer pension plans are eligible?

- Plans in "critical and declining status" (within the meaning of section 305(b)(6) of ERISA) in any plan year beginning in 2020 through 2022.
- Plans for which a suspension of benefits has been approved (under section 305(e)(9)) as of the date of the enactment of the EPPRA.
- Plans with a modified funded percentage of less than 40% with more retirees than active workers (less than 2:3 ratio) in any plan year from 2020 through 2022. Under the EPPRA, modified funded percentage means "the percentage equal to a fraction the numerator of which is current value of plan assets and the denominator of which is current liabilities."
- Plans that became insolvent (under section 418E of the Internal Revenue Code of 1986) after December 16, 2014, and have remained insolvent.

Eligible funds must apply to the Special Financial Assistance Program no later than December 31, 2025.

(3) How much money will eligible plans be receiving? After a plan's application is approved, the PBGC will make a single, lump-sum payment in the amount required for the plan "to pay all benefits due during the period beginning on the date of enactment and ending on the last day of the plan year ending in 2051 with generally no reduction in a participant's or beneficiary's accrued benefit." Essentially, the PBGC would be paying *all* pension benefits owed to retirees. There is no cap on this payment, and the funding predictions will be performed on a "deterministic basis."

(4) Do the payments come with any obligations? Plans would have to reinstate benefits that were suspended and invest the monies in investment-grade bonds or other investments allowed by the PBGC.

II. HOW DOES THE SPECIAL FINANCIAL ASSISTANCE PROGRAM AFFECT EMPLOYERS?

Like the temporary relief for multiemployer pension plans and the lump sum payments to hold those plans over until 2051, the EPPRA similarly "kicks the can" down the road for the PBGC to determine the EPPRA's effect on employers.

The version of the EPPRA passed by the House of Representatives on February 27, 2021, included a provision that special financial assistance payments received by multiemployer pension plans would *not* be included in withdrawal liability calculations for 15 years after the effective date of the special financial assistance. This withdrawal liability provision of the EPPRA has since been removed by the Senate to avoid a procedural violation under the budget reconciliation process.[3]

Instead of a fixed 15-year rule, the EPPRA provides that the PBGC "in consultation with the Secretary of the Treasury, may impose, by regulation or other guidance, reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to increases in future accrual rates and any retroactive benefit improvements, allocation of plan assets, reductions in employer contributions rates, diversion of contributions to, and allocation of expenses to, other benefit plans, and withdrawal liability."

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This provision means that, until the PBGC issues some guidance, employers will be left in the dark about how the special financial assistance program will help them, if at all.

However, employers may receive some guidance sooner because the EPPRA requires PBGC to issue, within 120 days of enactment, interpretative regulations or guidance on the requirements for the special financial assistance program.[4] Progress of these interpretative regulations should be monitored.

III. HOW WILL THE PBGC PAY THE LUMP SUM PAYMENT?

Based upon the predictions and concerns about the solvency of the PBGC account for multiemployer funds past 2026, the availability of monies to pay for the lump payments will be interesting.

The EPPRA provides an $86 billion aid package for pension plans. Large plans, such as Central States, Southeast and Southwest Areas Pension Plan that covers about 400,000 retirees and workers may receive about half of the allotted aid.[5]

These lofty goals seem promising, but employers should be wondering how the EPPRA will operate. Questions regarding how many pension plans will require relief, and practical considerations about how the PBGC will secure the funding to relieve the eligible plans, remain to be answered.

Interestingly, there may be fewer eligible funds than predicted. In *Milliman's December 2020 Multiemployer Pension Funding Study*,[6] the actuarial firm concluded that the aggregate funded percentage for all multiemployer pension plans as of

December 31, 2020, was 88%, the highest percentage it has been since before the 2008 market crash.

However, this study relies predominately on data from Form 5500s from the 2018 and 2019 plan years. According to Milliman, the impact of COVID-19 is thus reflected only on investment returns, and not plan participation or contribution levels.

The study provides valuable insight into the potential number of pension plans eligible for the Special Financial Assistance Program. Only 124 pension plans were designated as "critical and declining" as of December 31, 2020. These plans are projected to remain underfunded through 2025. From these figures, at least 124 pension plans will be eligible for the Special Financial Assistance Program.

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The PBGC's 2020 Annual Report[7] reflects the looming insolvency of its Multiemployer Insurance Program by 2027. While federal funding from the Bipartisan American Miners Act of 2019 to the United Mine Workers of America 1974 Pension Plan staved off PBGC's insolvency for an extra year, the reality remains dire.

When the Multiemployer Insurance Program becomes insolvent, the PBGC can no longer provide financial assistance to pay the current level of guaranteed benefits in insolvent plans. This projected insolvency of the PBGC logically impacts the lofty goals of the EPPRA, which directs the PBGC to pay essentially *all* pension benefits owed to retirees from the date of the EPPRA's enactment to the last day of the plan year ending in 2051.

The insolvency of the PBGC may render the promises of the EPPRA hollow!

If the PBGC Multiemployer Insurance Program is on the brink of insolvency, how can it pay hefty lump-sum payments to roughly 124 pension plans?

The text of the EPPRA does little to answer this question. The text of the EPPRA provides that "an eighth fund shall be established for special financial assistance to multiemployer pension plans," and that funds will be appropriated from the general fund to provide for the costs of providing financial assistance.

It continues that this eighth fund will be "credited with amounts from time to time as the Secretary of Treasury, in conjunction with the Director of the PBGC, determines appropriate, from the general fund of the Treasury."

Sadly, despite all the "bells and whistles," any bailout of the funds will come from taxpayer dollars. The "general fund of the Treasury" is a nicer way of saying it.

Notes

1 https://bit.ly/3clSH2f

2 https://bit.ly/3smlVDH

3 Budget Reconciliation is a process created by the Congressional Budget Act of 1974 that provides instructions for how Budget Committees create and implement budget resolution policies affecting mainly permanent spending and revenue programs. https://bit.ly/3fdH2nP

4 https://bit.ly/3darEpw

5 https://bit.ly/3srVKLK

6 https://bit.ly/3ffRSK2

7 https://bit.ly/3shFnkR

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