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Virus Relief Law Doesn't Nix Employers' Pension Plan Hurdles

By **Jason Levy** (April 27, 2021, 12:55 PM EDT)

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The multiemployer plan provisions in the American Rescue Plan Act, signed into law on March 11, give stakeholders in the multiemployer pension plan system reason to cheer. Boiled down to its essence, the law provides lump-sum cash infusions from the federal government to troubled multiemployer pension plans in amounts intended to keep the plans solvent for the next 30 years.

As a result, retirees who may have worked decades to earn a pension in one of these troubled plans no longer face the threat of devastating benefit cuts. Likewise, the Pension Benefit Guaranty Corp. multiemployer insurance program no longer faces the threat of looming insolvency.

Employers that participate in a multiemployer pension plan, or are considering whether to participate, also stand to benefit — although core challenges related to managing participation in multiemployer pension plans, including the prospect of substantial withdrawal liability, will remain.

Considerations for Employers That Participate in Troubled Multiemployer Plans

The new multiemployer legislation provides benefits to employers that participate in troubled multiemployer plans eligible for financial assistance. At a minimum, such employers no longer will be faced with the looming prospect of being forced to choose between making contributions to an insolvent plan or incurring substantial withdrawal liability.

In addition, the legislation eliminates the prospect of devastating benefit cuts without requiring additional employer contributions to the plan.

The coming weeks and months will shed light on whether there may be additional impact from the legislation. The PBGC is required to issue regulations or other guidance within 120 days of the legislation's enactment regarding requirements for applications for financial relief.

In addition, the PBGC is authorized to impose conditions on multiemployer plans that receive financial assistance, including ones related to reductions in employer contribution rates and withdrawal liability.

It will be worthwhile for employers to monitor their plans' applications for financial relief and any new authority from the PBGC to analyze how they may be affected — for example, via provisions addressing

employer contributions in current and future red zone rehabilitation plans, or addressing the extent to which withdrawal liability calculations should account for financial assistance in the short and long term.

Considerations for Employers That Participate in Healthier Plans

Employers in healthier plans that will not receive financial assistance also benefit. Prior legislative proposals to address the solvency crisis of troubled plans and the PBGC have included numerous provisions that would have inflicted serious harm on such employers.

For example, prior proposed legislation contemplated substantial per-participant premium increases, variable rate premiums that were incompatible with the multiemployer plan system, employer and union surcharges that would needlessly impose new administrative costs, and mandatory discount rates that would have caused a massive increase in plan liabilities and a precipitous drop in funding levels.

Each of these provisions could have imposed substantial costs that likely would have been passed along to employers that participate in healthier plans. By contrast, the new multiemployer plan legislation includes a more modest increase in per-participant PBGC premiums, and otherwise, does not include any of the harmful provisions previously contemplated.

Challenges for Both Groups of Employers

The legislation leaves unchanged the laws governing a core challenge in managing employer participation in multiemployer pension plans: withdrawal liability. Withdrawal liability is, in essence, an exit fee requiring the withdrawing employer to pay its share of the plan's unfunded benefit obligations as a condition of leaving the plan. For many employers, withdrawal liability — if it is ever assessed — will be substantial.

Withdrawal liability generally is calculated as a proportionate share of the underfunding when the employer withdraws. By their nature, troubled plans have significant underfunding, which places contributing employers at risk of substantial withdrawal liability.

While employers in troubled plans will want to monitor forthcoming PBGC authority to determine the impact financial assistance may have on withdrawal liability calculations, employers in troubled plans shouldn't count on the new legislation to wipe away this risk.

Likewise, employers in healthier multiemployer plans may not be immune from this risk. Large multiemployer pension plans may have hundreds of millions or billions of dollars in unfunded benefit liabilities, even though they generally are considered to be well funded.

Consequently, even a small proportionate share of hundreds of millions or billions of dollars in unfunded liability may yield a multimillion-dollar withdrawal liability assessment — that is, a small share of a large unfunded liability can still result in a significant withdrawal liability assessment.

Complex rules govern when a multiemployer plan is permitted to assess liability for a complete or a partial withdrawal. Nevertheless, it is by no means a foregone conclusion that an employer will be assessed withdrawal liability; employers can, and do, participate in multiemployer plans over long time horizons without ever triggering withdrawal liability.

Given the stakes, prudent employers should monitor their participation in multiemployer pension plans

with an eye toward understanding and managing this potential liability.

Next Steps

Employers may wish to use this legislation as an inflection point to reassess their short- and long-term strategies for management of multiemployer pension plan liabilities. The new legislation continues a long tradition of complex, deeply technical rules for multiemployer plans. Those rules can appear to offer opportunities but often hide traps for the unwary.

All other things being equal, the new multiemployer plan legislation could make participating in multiemployer plans more attractive to employers — but at the same time does not eliminate the core challenges of multiemployer plan participation and attendant liabilities. The full impact on employers that participate in troubled plans may become clearer in the coming weeks and months.

Such employers may want to closely monitor forthcoming guidance or regulations from the PBGC and scrutinize their plans' applications for financial relief for the potential short- and long-term impact on employer contribution obligations and withdrawal liability.

Employers that participate in healthier plans have cause to exhale because none of the most harmful provisions in prior legislative proposals were enacted. Nevertheless, the legislation leaves unaltered the key obstacles associated with multiemployer plan participation, including the prospect of substantial withdrawal liability.

Prudent employers in both groups will want to closely manage their multiemployer plan participation to avoid incurring unexpected and substantial liabilities. Notwithstanding the many positive aspects of this legislation, managing participation in multiemployer pension plans remains an area where employers should continue to tread with great caution and careful forethought.

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