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Multiemployer Provisions in the American Rescue Plan Act of 2021

The American Rescue Plan Act of 2021, which was signed by President Biden on March 11, 2021, contains various provisions related to multiemployer pension plans. The statute provides plans with temporary relief from some of the funding rules and provides direct financial support to certain underfunded plans. As with many laws, significant details are left to be defined in regulations or other guidance. As a result, we may not know the full impact of these changes for some time.

Funding Relief

The Act contains three separate types of funding relief designed to help plans that have incurred losses as a result of the COVID-19 pandemic.

<u>Freeze of Zone Status (Act Section 9701)</u> – For the first plan year that begins between March 1, 2020 and February 28, 2021 or the next succeeding plan year, a plan can elect to remain in the same zone status as applied in the immediately preceding plan year. And, if the plan was already in endangered or critical status, a plan that elects to freeze its zone status is not required to update its funding improvement plan or rehabilitation plan until the plan year following the year of the freeze.

If the plan would have been in critical status except for this section, the plan still receives the benefit of provisions that generally protect plans in critical status from the negative effects of failing to meet the minimum funding standards (i.e., the requirement that the employers make contributions sufficient to cover the funding deficiency and the excise tax penalties that otherwise apply to minimum funding deficiencies).

A plan making an election under this section is required to notify participants, beneficiaries, bargaining parties, the PBGC, and the Secretary of Labor of the election.

<u>Extended Period for Meeting Funding Targets (Act Section 9702)</u> – A plan in endangered or critical status must meet funding targets during a specified time period. This period is generally ten years, although for many plans this period has been extended by prior relief legislation or by exceptions in the law. Under the Act, a plan can elect to extend whatever period currently applies by five years for plan years beginning after December 31, 2019.

The Act does not contain any explicit notification requirement for such election although the Secretary of the Treasury is empowered to prescribe the manner and form of the election which could possibly include a notification requirement.

<u>Spread of Losses (Act Section 9703)</u> – The Act allows plans (other than a plan receiving direct financial support under Section 9704 of the Act) to spread certain losses over extended periods for both the amortization of actuarial losses and the determination of the smoothed actuarial value of assets.

A plan is normally required to amortize any actuarial losses over 15 years. An actuarial loss is the shortfall between a plan's actual experience and that predicted by the plan's actuarial assumptions. Under the Act, a plan can elect to segregate certain losses incurred in either or both of the first two plan years beginning after February 29, 2020 and amortize those losses over 30 years. Net investment losses and losses related to COVID-19 and variants are eligible for this segregation. Those losses include reductions in contributions, reductions in employment, and deviations from anticipated retirement rates.

Typically, a plan uses a smoothed actuarial value of assets to determine its minimum funding requirement. In determining the actuarial value of assets, a plan typically spreads gains or losses over a period of up to five years. Under the Act, a plan can elect to spread investment losses incurred in either or both of the first two plan years beginning after February 29, 2020 over a period of up to 10 years in the determination of the actuarial value of assets. In addition, a plan may elect to increase the upper limit by which the actuarial value of assets is permitted to exceed the fair market value of assets from 120% of market value to 130% of market value.

Before a plan can make any of these elections, it must meet a solvency test. This test is met if the plan actuary certifies that the plan is projected to have sufficient assets to pay benefits and anticipated expenditures over the extended amortization period.

A plan making any of these elections is required to notify participants, beneficiaries, and the PBGC. And the plan is subject to restrictions on benefit increases until two years after all elections which it has made cease to apply, unless such increases are certified by the plan actuary to meet specified requirements.

Direct Financial Support (Act Section 9704)

The Act provides for lump sum grants to plans through September 30, 2030. There does not appear to be a dollar limit on the total amount of the grants.

<u>Eligible Plans</u> – To be eligible for a grant, a plan must fit into one of the following categories:

- The plan is in critical and declining status in any plan year beginning in 2020, 2021, or 2022.
- A benefit suspension as allowed for certain plans in critical and declining status has been approved for the plan as of March 11, 2021.
- The plan a) is in critical status for a plan year beginning in 2020, 2021, or 2022; b) has a ratio of active to inactive participants that is less than 2 to 3; and c) has a "modified funded percentage" of less than 40%.

  The modified funded percentage is equal to the market value of plan assets divided by the current liability. The current liability is the present value of accrued benefits under the plan valued using a specified mortality table and an interest rate in a range defined in ERISA (the range for February 2021 was 2.05% to 2.39%).

- The plan became insolvent for purposes of Internal Revenue Code Section 418E after December 16, 2014 and has remained insolvent and has not terminated as of March 11, 2021.

Priority – The PBGC is empowered to issue regulations or guidance that provides that for a period of up to two years after enactment of the Act a plan cannot file for assistance unless it meets one of the following criteria:

- The plan is insolvent or is likely to become insolvent within five years of enactment.
- The PBGC projects that the present value of amount it will be required to provide to pay guaranteed benefits if special financial assistance is not granted exceeds $1 billion.
- The plan has implemented a benefit suspension of the type allowed for plans in critical and declining status prior to March 11, 2021.
- The PBGC determines that it is appropriate based on other similar circumstances.

Application – Applications for assistance must be filed by December 31, 2025 with the deadline for any revised applications being December 31, 2026. The Act directs the PBGC to limit the material required for the application to the minimum necessary to make a determination on the application. And the PBGC is to accept the assumptions used by the plan for the last zone certification completed prior to January 31, 2021 unless clearly erroneous. However, the interest rate used can't exceed the third segment rate described in funding rules for single employer plans for the month of the application or the three preceding months by more than 200 basis points (the third segment rate was 3.59% for February 2021).

The application is deemed to be approved unless the PBGC notifies the plan within 120 days of filing that the application is incomplete, any proposed assumption change is unreasonable, or the plan is not eligible.

Amount of Payment – The payment to the plan is a lump sum payment of the amount needed to pay benefits through the plan year ending in 2051. However, there is some ambiguity in how to measure that amount. Any reductions in adjustable benefits that went into effect prior to the adoption of the Act will remain in effect.

Requirements on Plans Receiving Aid – A plan getting assistance must reinstate any suspensions of benefits that were allowed for a plan in critical and declining status and suspensions for insolvent plans. The reinstatement applies beginning as of the first month in which the effective date of the financial assistance occurs for participants and beneficiaries as of that date. In addition, the plan must pay such participants and beneficiaries retroactively for past benefit suspensions. This payment can either be in a lump sum within three months of the effective date of the assistance or in equal monthly installments over five years beginning on that date.

Any assistance received must be segregated from other plan assets and invested in investment grade bonds or other assets approved by the PBGC. The Act does not specify which asset pool is used first to pay for benefits and expenses.

Conditions – The PBGC, in consultation with the Secretary of the Treasury, is empowered to impose reasonable conditions by regulation or other guidance related to increases in future accrual rates, retroactive benefit improvements, allocation of plan assets, reduction of employer contribution rates, diversion of contributions, allocation of expenses to other benefit plans, and withdrawal liability. However, they are specifically prohibited from imposing restrictions on prospective reductions in adjustable benefits, plan governance, and funding rules.

A plan receiving assistance is deemed to be in critical status until the plan year ending in 2051. A plan receiving assistance that subsequently becomes insolvent is subject to existing rules for insolvent plans. And a plan receiving assistance in ineligible for any new critical and declining plan suspensions.

Increase in PBGC Premium

Effective for plan years beginning after December 31, 2030, the PBGC premium increases to $52 per participant (the rate for 2021 is $31, indexed for inflation through 2030). For subsequent years, the premium rate will continue to be indexed for inflation.

Effect on Employers

Nothing in the Act directly affects contributing employers. The financial assistance should allay employers' concerns regarding impending mass withdrawals in large multiemployer plans. And the assistance may reduce the pressure for future contribution rate increases. On the other hand, for employers hoping to bargain out of an underfunded plan, the financial assistance may increase the union's resolve to resist such withdrawal.

There has been some speculation that financial assistance would serve to reduce withdrawal liability. A provision in the earlier House bill explicitly stated that withdrawal liability would be determined without regard for such assistance for 15 years. That provision was removed to enable the Act to comply with the Senate's Byrd Rule, which enables the Senate to pass a bill under the reconciliation rules and thus does not require 60 votes for passage. However, the PBGC is specifically empowered to issue regulations or guidance for plans receiving assistance in various areas including withdrawal liability. Thus, the PBGC may well impose conditions that limit the extent to which such assistance can be used to reduce withdrawal liability. But, as with many aspects of the Act, we will need to wait for further guidance before we know what, if any, effect the Act will have on withdrawal liability.

About Dexter Hofing

Dexter Hofing is an actuarial consulting firm specializing in assisting employers with multiemployer pension plan issues. Please see www.dexhof.com for additional information.

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