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Multiemployer Plans

President Expected to Sign Spending Bill Addressing Multiemployer Plans, 4062(e)

President Barack Obama was expected to sign into law a $1.1 trillion U.S. government spending bill that includes elements designed to boost the nation's troubled multiemployer pension plan system and provisions addressing several other employee-benefits-related areas.

The Senate passed the legislation (H.R. 83) on a 56-40 vote late Dec. 13. The House voted 219-206 to pass it Dec. 11. The White House has signaled the president will sign the bill, which would fund most of the federal government through the end of fiscal year 2015.

Among the multiemployer items in the legislation (H.R. 83) is a highly contentious provision that would allow distressed pension plans to reduce retirees' benefits. Other provisions would increase Pension Benefit Guaranty Corporation premiums and make permanent—with some changes—Pension Protection Act funding rules aimed at helping plans in financial straits. The funding rules were set to expire at the end of the year.

Outside of the multiemployer realm, the legislation also addresses the heated issue of pension plan withdrawal liability resulting from ''substantial cessation of operations'' under Section 4062(e) of the Employee Retirement Income Security Act, health plans for expatriates, the definition of ''normal retirement age'' under ERISA, and cooperative and small employer charity pension plans.

It also targets spending on various elements of the Affordable Care Act (see related article in this issue).

'Tools They Need.' The multiemployer provisions are the result of a three-year effort by the National Coordinating Committee for Multiemployer Plans, a coalition of businesses and unions, to prop up and preserve the flailing multiemployer system.

Randy G. DeFrehn, executive director of the NCCMP, said in a Dec. 9 statement that the ''bipartisan agreement gives pension trustees the tools they need to maintain plan solvency, preserves benefits for the long haul, and protects the 10.5 million multiemployer participants. With time running out on the retirement security of millions of Americans, moving this bipartisan proposal forward now is not only timely, but necessary.''

In a Dec. 10 House Rules Committee hearing on the appropriations legislation, Rep. John Kline (R-Minn.), chairman of the Education & the Workforce Committee, said that the bill would address the ''crisis affecting millions of Americans,'' and would support the PBGC, employers and retirees by providing the tools necessary to avoid plan insolvency.

The amendment is ''a good solution,'' and Congress can't let the opportunity to take action pass by in the hopes that a better solution will come along later, Kline said.

However, the provisions came under fire from a number of lawmakers and unions.

Sen. Tom Harkin (D-Iowa), chairman of the Senate Health, Education, Labor & Pensions Committee, said in a Dec. 10 statement that the proposal ''is not balanced and fails to fix the multiemployer system. It is focused almost purely on cutting retiree benefits.''

Harkin, who is retiring at the end of the year, said the proposal ''asks retirees to take potentially enormous cuts to benefits that were earned and promised, without effectively preserving the pension system going forward.''

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—Randy G. DeFrehn, National Coordinating Committee for Multiemployer Plans

Rep. George Miller (D-Calif.), ranking member of the Education and the Workforce Committee, who partnered with Kline on negotiating the amendment, said, however, that even if legislation revises retirement plan law to allow reductions in benefits, whether a multiemployer plan actually does so is a decision that union membership must vote on, and so is voluntary, not mandatory.

''Many union locals have already made this decision with their members'' to reduce benefits, but have been prevented from actually doing so by ERISA's prohibition on benefit cutbacks, Miller said. Giving union

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members the option to reduce their benefits to avoid a plan implosion preserves the retirees' ''dignity'' by allowing them ''to take control of their pensions,'' he said.

The Congressional Budget Office said the multiemployer pension plan amendments would increase the federal deficit by $1.1 billion over 10 years.

PBGC Deficit. Only eight distressed multiemployer plans have the potential to bring down the whole system and topple the PBGC's endangered multiemployer program, Miller said during the hearing.

The PBGC's annual report, released in November, showed that the agency's multiemployer program had a record deficit of more than $42 billion, more than five times higher than its already record high set in 2013 (41 BPR 2390, 11/25/14).

The PBGC said in the report that absent legislative changes, its multiemployer program faced a greater than 50 percent chance of insolvency by 2022, and a 90 percent chance of running out of money by 2025.

One of Harkin's criticisms of the proposed amendment is that it wouldn't improve this situation, leaving the PBGC ''woefully underfunded, pushing out insolvency by just two years.''

However, Joshua Gotbaum, guest scholar in the Brookings Institution's Economic Studies department and former director of the PBGC, told Bloomberg BNA in an e-mail Dec. 10 that the proposed amendment ''means that, although some people's pensions will be smaller they have the security of knowing they will get pensions. Without the bill, pensions covering more than a million people would have collapsed and PBGC wouldn't have the money to help. Now pensions can act to preserve benefits at reasonable levels if they can and PBGC will have funds to help them if they cannot.''

The House Education and the Workforce Committee released a document with letters of support of the measures in the amendment. Supporters included unions such as the Associated General Contractors of America, National Electrical Contractors Association and the United Food and Commercial Workers International Union, and corporations such as Aramark, ConAgra Foods Inc., Kellogg Co. and the Kroger Co.

But several unions and retiree representatives excoriated the benefit cutback proposal, saying that making the revision of ERISA would violate a ''sacred'' right of plan participants to their full benefits.

One of the ''central tenets'' of ERISA ''is that once participants and retirees earn their benefits, they can't be cut back,'' Karen Friedman, executive vice president and policy director for the Pension Rights Center, said Dec. 9.

''And the NCCMP turns ERISA and its sacred principles on its head, by basically saying retirees' benefits are going to be cut first, not last. And they would be cut before a plan even becomes insolvent. Under the law, retirees are always paid, even when plans have problems, until they have no assets,'' Friedman said. Only after the plan has gone under would the PBGC step in to handle the participants' benefits, although those would be much reduced to the agency's statutory levels, she said.

Premium Increases. Another provision in the amendment would raise the premium rates that multiemployer plans have to pay into the PBGC's multiemployer fund.

Those rates are considerably lower than what single-employer plans pay. For example, the 2015 flat-rate premium for single-employer plans is $57 per participant, while the flat rate for multiemployer plans is $13. The legislation would double the premium to $26 per participant in 2015, with increases indexed to inflation thereafter.

AARP and the Pension Rights Center agree that the rates should rise, but the Laborers' International Union of North America (LIUNA) vehemently objected to the premium increases.

''The mission of the PBGC is noble, but the fact is it is broke and it cannot be fixed. The rumored proposals would cost LIUNA retirees tens of millions of dollars a year, all for an impossible mission. Escalating the insurance tax is political posturing and back-room deal-making,'' Terry O'Sullivan, general president of LIUNA, said in a Dec. 9 statement.

Many of the unions that spoke in favor of the multiemployer provisions overall took a more measured approach in critiquing the premium increases.

Sean McGarvey, president of North America's Building Trade Unions, said in a letter of support that his organization is nevertheless ''concerned with the PBGC premium increase contained in the final legislative language and would urge lawmakers to take a serious look at PBGC structure and funding next year.''

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—SEN. TOM HARKIN (D-IOWA)

The Service Employees International Union's president, Mary Kay Henry, said in a letter of support that future legislation should include ''a reasonable cap on PBGC premium payments.''

PPA Funding Rules. A much less contentious element in the legislation was a permanent extension—with some changes—of Pension Protection Act funding rules aimed at helping plans in financial straits.

The funding rules require administrators of plans that are less than 80 percent funded or have significant funding deficiencies to take measures to salvage those plans.

Tax extenders legislation (H.R. 5771) that was set to be taken up by the Senate would give a one-year extension to the PPA funding rules (41 BPR 2474, 12/9/14).

The federal spending legislation would allow a plan projected to be in critical status in the succeeding five plan years to elect to be in critical status in the current year, according to a summary.

It would also add a special rule stipulating that endangered status would no longer apply to a plan if its actuary certified that it was projected to no longer be in endangered or critical status after 10 plan years, and it wasn't in endangered or critical status for the immediately preceding plan year.

Among other changes to the PPA rules, the legislation would expand the disclosure rules for troubled plans, and repeal the reorganization rules for multiemployer plans. These provisions would be effective for plan years beginning after Dec. 31.

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In addition, the bill would provide a guarantee for qualified pre-retirement survivor annuities under multiemployer plans, stating that annuities payable to the surviving spouse of a plan that becomes insolvent or is terminated wouldn't be forfeited solely because the participant hadn't died as of the date on which the plan became insolvent or was terminated. The guarantee would be retroactive for payments that became payable on or after Jan. 1, 1985, except that the legislation wouldn't apply in any case in which the surviving spouse had died before the spending bill is passed.

Mergers and Partitions. The legislation would also give the PBGC the authority to promote and facilitate the merger of two or more multiemployer plans, and plan sponsors would have the ability to apply to the PBGC for a partition.

Regarding mergers, the PBGC would be required to determine if it is in the interests of the participants and beneficiaries of at least one of the plans and wouldn't reasonably be expected to be adverse to the overall interests of the participants and beneficiaries of the other plans.

A plan sponsor seeking permission to partition its plan would only be able to do so if the plan were in critical and declining status, if the sponsor had taken all reasonable measure to avoid insolvency and if the sponsor met other requirements as well.

The PBGC has exercised its partitioning authority only three times in its 40-year history, with the most recent in January 2014 when it broke out the Bakery and Sales Drivers' multiemployer pension plan to cover former Hostess Brands LLC employees while coordinating a merger with another plan for the remaining participants (41 BPR 249, 2/4/14).

Before Hostess, the PBGC divided the Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund in 2010 (37 BPR 1269, 6/8/10). The first partition was in 1983, for the Council 30 Sanders Retirement Plan.

Friedman of the Pension Rights Center told Bloomberg BNA on Dec. 9 that her organization is ''certainly willing'' to support measures that would help the PBGC facilitate mergers and partitions when necessary to protect plan participants.

Shutdown Liability. The multiemployer plan provisions aren't the only employee benefit elements in the legislation that addressed a controversial topic. The bill also would adopt legislation sponsored by Harkin that would clarify and broaden the definition of ''substantial cessation of operations'' under ERISA.

Under Section 4062(e), if a company ceases operations at a facility that results in 20 percent of employees who are plan participants losing their jobs, the company is treated as though it is subject to withdrawal liability on the termination of single-employer plans under multiple controlled groups. Business and retirement groups have complained that the PBGC's interpretation of the shutdown provisions is inconsistent with ERISA because routine business transactions can trigger the 4062(e) liabilities.

S. 2511, passed by unanimous consent in the Senate in September, redefines the liability trigger from 20 percent of plan participants to 15 percent of all employees of the employer (41 BPR 1981, 9/23/14). The bill also specifies that a cessation of operations must be ''permanent.''

The bill's clarifications are supported by the business community, which said that the PBGC's original proposed regulations were too broad, too expensive and would make business planning difficult.

Kathryn L. Ricard, senior vice president for retirement policy at the ERISA Industry Committee, said Dec. 10 that her organization is ''very supportive'' of the measure.

Kent A. Mason, a partner with Davis & Harman LLP, and outside counsel to the American Benefits Council, told Bloomberg BNA on Dec. 10, ''We were extremely pleased that this provision was included in the Kline-Miller amendment because it is a very effective solution to a serious problem in the pension area.''

In July, the PBGC announced a moratorium on 4062(e) enforcement until the end of the year, and said at the same time that it was working on nonregulatory guidance (41 BPR 1445, 7/15/14).

DOL Budget, Other Provisions. The appropriations bill would provide $181 million for the Department of Labor's Employee Benefits Security Administration, down 4 percent from the $188.4 million it requested but up 1 percent from the $178.5 million it was appropriated for fiscal year 2014 (41 BPR 549, 3/11/14).

It would cut funding for the Internal Revenue Service to the lowest level since before 2008 (see related article in this issue).

The appropriations bill would also exempt health plans for Americans living outside the U.S. from many coverage requirements under the Affordable Care Act.

That provision largely reflects a bill (H.R. 4414) that passed the House in April (41 BPR 968, 5/6/14) but failed to advance in the Senate.

One item in the bill would add a section to ERISA expanding the definition of ''normal retirement age'' for some existing defined benefit plans to include ''the age at which a participant completes the number of years (not less than 30 years) of benefit accrual service specified by the plan.''

Another provision would tweak Section 210(f) of ERISA on what constitutes a cooperative and small employer charity pension plan. That section was added to ERISA by legislation (H.R. 4275), signed into law by President Barack Obama in April, that allows charities and cooperative organizations to sidestep rigorous pension funding rules created under the Pension Protection Act of 2006 (41 BPR 826, 4/15/14).

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Text of the main part of the appropriations bill is at http://op.bna.com/pen.nsf/r?Open=pkun-9rnuvj. Text of the amendment that included the multiemployer plan provisions is at http://op.bna.com/pen.nsf/r?Open=pkun-9rnuvx. Text of the House Education and the Workforce Committee summary of the multiemployer provisions is at http://op.bna.com/pen.nsf/r?Open=sfos-9rnuzl. Text of the CBO score of the PBGC provisions is at http://op.bna.com/pen.nsf/r?Open=sfos-9rnphy. The document with letters of support for the multiemployer provisions is at http://op.bna.com/pen.nsf/r?Open=pkun-9rnvzv.