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President Obama Signs the Multiemployer Pension Reform Act of 2014

New legislation is enacted to assist and fortify deeply troubled multiemployer pension plans.

On December 16, U.S. President Barack Obama signed into law sweeping changes to the current law that governs multiemployer pension plans. He signed the omnibus government budget and spending bill recently passed by Congress, which included the Multiemployer Pension Reform Act of 2014 (the Pension Reform Act or the Act).

As an overview, the Pension Reform Act enacts the following:

- Permanently extends certain Pension Protection Act (PPA) provisions that were expected to expire at the end of 2014
- Creates a new funding status labeled "critical and declining status," and provides plan sponsors of plans in this status with tools to suspend benefits for both actives and retired participants
- Amends current plan partition rules to permit the Pension Benefit Guaranty Corporation (PBGC) to approve a partition without a bankruptcy requirement
- Provides the PBGC with increased authority to facilitate plan mergers, including the statutory authority for the agency to provide financial assistance to do so
- Increases PBGC premiums from the $12 per capita currently in effect to $26 per capita beginning in calendar year 2015
- Includes numerous technical corrections and clarifications to the PPA and the Internal Revenue Code.

Most of the Pension Reform Act's provisions become effective for plan years that commence after December 31, 2014. Throughout the Act, the Secretary of the Department of the Treasury (Treasury) is charged with primary oversight of many of the Act's provisions and regulation promulgation, in consultation with the PBGC and the Department of Labor (DOL).

In the following sections, we provide a more detailed overview of the provisions set forth within the Pension Reform Act.

Amendments to Assist Deeply Troubled Plans

Critical and Declining Status

The Pension Reform Act creates a new plan status known as "critical and declining status." A plan shall be in this status if the plan

- Is projected to become insolvent in the current year or any of the 14 succeeding plan years; or

- Is projected to become insolvent in the current year or any of the 19 succeeding plan years, and meets one of the following additional tests—the ratio of inactive to active participants exceeds 2 to 1, or the plan is less than 80% funded.

Benefit Suspensions

Under the Pension Reform Act, plans that are deeply troubled and projected to be in the newly created "critical and declining status" may apply to the Treasury to voluntarily suspend pension benefits for participants in pay status and accrued benefits for participants not in pay status. The term "suspension of benefits" is defined in the Pension Reform Act to mean "the temporary or permanent reduction of any current or future payment obligation of the plan to any participant or beneficiary under the plan, whether or not in pay status at the time of the suspension of benefits."

Retiree Representative. During the suspension approval process, the Pension Reform Act provides for a retiree representative for plans with 10,000 or more participants, which must be selected no later than 60 days from the plan's submission of an application to the Treasury to suspend benefits. The plan sponsors are charged with selecting a retiree representative to be an advocate for the interests of the retirees and inactive participants in the application for benefit suspension process.

Suspension Conditions and Limitations. A plan in "critical and declining status" may suspend benefits only if the plan's actuary certifies that, considering the proposed suspension, the plan is projected to avoid insolvency. The plan sponsor must determine that even though it has taken all reasonable measures to forestall insolvency, the plan is still projected to become insolvent unless the proposed benefits are suspended.

A plan in "critical and declining status" may only suspend benefits subject to the following limitations:

- A participant's or beneficiary's monthly benefit cannot be reduced below 110% of the PBGC guarantee.
- Participants and beneficiaries ages 75 and older at the date of suspension have limitations on the suspension.
- Participants and beneficiaries ages 80 and older at the date of suspension are exempt from benefit suspensions.
- Disability pensions are exempt from benefit suspensions.
- Benefit suspensions shall be reasonably implemented to avoid plan insolvency.

The Pension Reform Act includes a list of factors that a plan sponsor must consider to ensure that the benefit suspensions are equitable, including age, number of years to retirement, and the participants' benefit histories.

Additionally, the Pension Reform Act provides for a special benefit suspension allocation rule. First, any reductions in the plan's benefits must be allocated, to the maximum extent possible, to benefits attributable to a participant's service for an employer that withdrew from a plan without paying its full withdrawal liability or the full amount agreed to with the plan. Second, all other benefits not attributable to service with the withdrawn employer may be suspended. Third, benefits under the plan attributable to a participant's service with an employer that withdrew prior to the date of the Pension Reform Act's enactment and that has paid its full amount of withdrawal liability would be suspended only after all other benefits have been suspended to the maximum extent allowable.

Treasury Approval. To suspend benefits, the plan sponsors of a critical and declining status plan must apply to the Treasury and demonstrate that the plan meets the new statutory requirements. Concurrently with a plan's submission of an application to suspend benefits, the plan sponsor must provide notice to participants, beneficiaries, contributing employers, and the respective union representatives. Within 30 days of the Treasury receiving the plan's application, it must publish a notice in the *Federal Register* soliciting comments. The Treasury must approve or deny the application within 225 days, or the application is automatically deemed approved. If the Treasury rejects the application, the plan may challenge the denial through judicial review procedures.

Voting and Ratification. If the Treasury approves a plan's application to suspend benefits, the suspension is subject to a vote of all participants and beneficiaries within 30 days of the approval. The proposal for benefit suspension is rejected only if a majority of all participants and beneficiaries (not simply a majority of those who vote) reject it. The plan sponsor may submit a new application if the suspension is rejected under the vote. Suspensions of benefits will not take effect until after the vote.

Systemically Important Plans. If the participants and beneficiaries vote to reject the proposed benefit suspensions, the Treasury, within 14 days after the vote, and in consultation with the DOL and PBGC, must determine whether the plan is "systemically important," which is defined as resulting in $1 billion or more in projected PBGC liabilities if the plan's suspensions are not implemented. If a plan is determined to be systemically important and suspensions were not approved by the participants, the Treasury, in consultation with the DOL and PBGC, has the discretion to either accept the proposal terms or modify the benefit suspensions in some other manner projected to avoid plan insolvency.

Withdrawal Liability. Benefit suspensions are ignored for withdrawal liability calculation purposes, unless the employer's withdrawal occurs more than 10 years after the benefit suspension's effective date.

Oversight and Judicial Review. The Pension Reform Act includes other technical amendments regarding implementation and oversight of the benefit suspension process, including judicial review. The Treasury is directed to publish guidance to implement the benefit suspension amendments within 180 days after the Pension Reform Act's enactment.

Pension Plan Partitions

The Pension Reform Act drastically amends the Employee Retirement Income Security Act's (ERISA's) current partitioning rules applicable to multiemployer pension plans. It removes ERISA's previous limit that a partition was allowed only for those "orphan" beneficiaries attributable to a bankrupt employer. Additionally, upon application by a plan, the PBGC may order the partition of an "eligible multiemployer plan" under certain circumstances.

Application for PBGC Approval. Upon receiving the plan's application, the PBGC may order a partition of that plan if it determines it to be an eligible multiemployer plan and if the following conditions are satisfied:

- The plan is in critical and declining status.
- The PBGC determines that the plan has taken all reasonable measures to avoid insolvency, including the maximum benefit suspensions, as discussed above.
- The PBGC reasonably expects that the partition will reduce its expected long-term loss with respect to the plan, and partition is necessary for the plan to remain solvent.
- The PBGC certifies to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by such partition.
- The cost arising from such partition is paid exclusively from the PBGC's fund for basic benefits guaranteed for multiemployer plans.

Notice and Determination. Once a plan sponsor applies to the PBGC for a partition, it must notify the participants and beneficiaries within 30 days of submitting the application. The PBGC must make a determination regarding the plan's application within 270 days from the date the application is submitted. Within 14 days after the PBGC's partition order, the PBGC must provide notice to certain congressional committees.

Approved Partitions. If the PBGC approves the partition, the order must provide that the partitioned plan must transfer just enough of its liabilities to the successor plan created by the partition to keep the partitioned plan solvent. The successor plan becomes responsible for paying PBGC-guaranteed benefits and must be sponsored and administered by the same entities pre-partition. After the partition, the partitioned plan must pay a monthly benefit to each partitioned participant and beneficiary for each month that the benefit is in pay status in the amount by which the benefit that would be paid under the plan terms exceeds the PBGC's guaranteed benefit amount for that person.

Ten-Year Period Rules and Employer Withdrawals. The Pension Reform Act provides for additional rules that apply for the 10-year period following a plan's partition date. Additionally, in the event that an employer withdraws from the partitioned plan within 10 years following the partition date, the Act provides for special withdrawal liability calculation rules, which are applicable to both the partitioned and successor plans. However, if an employer withdraws from the partitioned plan beyond the 10-year period, the withdrawal liability is calculated only with respect to that partitioned plan.

Pension Plan Mergers

Under the Pension Reform Act, Congress has given the PBGC the authority to promote and facilitate the merger of two or more pension plans. Upon request of a plan, the PBGC may step in and facilitate a merger with another plan if

- The PBGC determines that the plan merger is in the best interests of the participants and beneficiaries of at least one of the plans; and
- The merger is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. The PBGC may provide assistance to a plan, such as training, technical assistance, mediation, communication with stakeholders, and support with related requests to other governmental agencies.

The PBGC may also provide financial assistance to facilitate a merger if

- One or more of the plans participating in the merger are in critical and declining status;
- The PBGC reasonably expects that financial assistance will reduce its expected long-term loss with respect to the plans involved;
- The PBGC reasonably expects that the financial assistance is necessary for the merged plan to become or remain solvent;
- The PBGC certifies that its ability to meet existing financial obligations will not be impaired by providing the financial assistance; and
- The assistance is paid from the PBGC's fund for basic benefits guaranteed for multiemployer plans.

Overview of the Pension Protection Act Amendments

Removal of the PPA Sunset

The Pension Reform Act removes the PPA's provision that requires certain remedial plan funding provisions to expire or "sunset" on or after December 31, 2014. Therefore, these PPA provisions shall remain in effect indefinitely.

Early Election of Critical Status

The Pension Reform Act allows plans projected to be in critical status in the five succeeding plan years to elect to be in critical status in the current plan year within 30 days of the plan actuary's certification.

Clarification of Emergence from Critical Status

The Pension Reform Act clarifies the rule applicable to determining whether a plan may emerge from critical status and essentially makes it more difficult for a plan to emerge from critical status. The Pension Reform Act states that in order for a plan to emerge from critical status, it must be certified that it does not meet any of the tests for critical status, must not be projected to have an accumulated funding deficiency for the current plan year or any of the nine succeeding plan years, and must not be projected to become insolvent for any of the 30 succeeding plan years.

If a plan in critical status has an automatic extension of amortization periods under ERISA, it may have an easier time emerging from critical status, even if it meets one of the tests for critical status, as long as the plan is not projected to have an accumulated funding deficiency for the current plan year or any of the nine succeeding plan years, without regard to the use of the shortfall method but taking into account any extension of amortization periods in effect prior to the PPA, and is not projected to become insolvent for any of the 30 succeeding plan years. This same plan that emerges from critical status may only reenter critical status if it no longer satisfies the aforementioned two-part test for emergence.

Endangered Status Not Applicable if No Additional Action Is Required

The Pension Reform Act amends current law to provide that a plan will not be in endangered status if the plan actuary certifies that the plan is projected to no longer be in endangered status as of the end of the 10th plan year ending after the plan year of the actuary's certification (without the plan implementing any further action).

Endangered Status Funding Improvement Plan's Target-Funded Percentage

The Pension Reform Act amends a plan's process for determining the target-funded percentage applicable to funding improvement plans so it will be based on the plan's funded percentage at an earlier point in time—the time of a plan actuary's certification of endangered status—rather than the projected percentage at the start of the funding improvement period.

Conforming Endangered and Critical Status Rules

The Pension Reform Act amends certain rules applicable to endangered status plans during the adoption and funding improvement periods with respect to benefit improvements, reductions in contribution levels, or exclusion from plan participation to make them consistent with similar rules that apply to critical status plans.

Default Schedules Implemented When Bargaining Parties Fail to Adopt Plan Schedules

The Pension Reform Act states that upon the expiration of a collective bargaining agreement (CBA), which had been agreed to under a funding improvement or rehabilitation plan, if the bargaining parties cannot agree on a new contribution schedule consistent with the applicable funding improvement or rehabilitation plan in a successor CBA, the contribution schedule under the previously expired CBA will be automatically implemented after 180 days from that CBA's expiration date. This amendment supplements the current rule that imposes the default schedule on bargaining parties that failed to adopt plan schedules in a prior CBA.

Repeal of Plan Reorganization Rules

The Pension Reform Act repeals the often burdensome reorganization rules added to ERISA by the Multiemployer Pension Plan Amendments Act of 1980.

Certain Contributions Disregarded for Withdrawal Liability Purposes

The Pension Reform Act states that surcharges previously implemented by the PPA and applicable to plans in critical status shall be disregarded when determining an employer's allocation of unfunded vested benefits and in determining an employer's highest contribution rate for the purposes of calculating that employer's withdrawal liability and the employer's schedule of periodic withdrawal liability payments to the plan, except in certain circumstances. Also, the Pension Reform Act provides that any increase in the contribution rate or other increase in contribution requirements, unless because of increased levels of work, employment, or periods for which compensation is provided, under a plan's funding improvement or rehabilitation plan shall also be disregarded in the aforementioned withdrawal liability calculations.

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Upon a plan's emergence from critical or endangered status, such contribution increases are used for the withdrawal liability calculation, except in determining the highest contribution rate and an employer's withdrawal liability payment schedule for the plan years during which the plan was in endangered or critical status.

The PBGC is charged with proscribing simplified methods for the application of this amendment in determining withdrawal liability. Further, this amendment shall apply to benefit reductions and increases in the contribution rate or other required contribution increases that go into effect during plan years beginning after December 31, 2014 and to surcharges for which the obligation accrues on or after December 31, 2014.

Qualified Preretirement Survivor Annuity (QPSA) Guarantees

The Pension Reform Act requires the PBGC to guarantee a plan's payment of QPSAs for spouses who are living as of the Act's enactment date, which will be retroactive to participants' deaths on or after January 1, 1985.

Increase in Plan Disclosure Requirements

The Pension Reform Act clarifies and expands the scope of a plan's information disclosure requirements upon request by a plan participant, beneficiary, employee representative, or contributing employer.

Increase in PBGC Premiums

The Pension Reform Act increased the per-capita PBGC premiums from the current rate of $12 per capita to $26 per capita, beginning in calendar year 2015. Thereafter, the PBGC will report to Congress no later than June 1, 2016 as to whether the premium levels enacted are sufficient to meet the basic benefit guarantee obligations for the 10- and 20-year periods beginning in 2015. If the PBGC report concludes that premium levels are insufficient, the PBGC must propose a schedule of revised premiums.

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