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Virus Bill's Private-Sector Pension Changes Spook Retirees

By **Emily Brill**

Law360 (March 5, 2021, 9:42 PM EST) -- The coronavirus relief package's marquee benefits provision will funnel $81.2 billion in Treasury dollars toward helping struggling union pension plans, but a part of the bill impacting nonunion pension and 401(k) plans has some retirees up in arms.

The component at issue in the $1.9 trillion American Rescue Plan, which passed the Senate on Saturday, gives private-sector companies' pension plans more time to make up investment losses.

Retirees' advocates say extending funding deadlines threatens workers' retirement security and deals another blow to single-employer pension plans to justify aiding union pension plans, which are also called multiemployer plans.

Lawmakers, on the other hand, say it provides necessary relief to companies weathering the financial impact of the COVID-19 pandemic, while offsetting the cost of the union pension plan rescue by about $22.8 billion.

Here, Law360 discusses the American Rescue Plan's single-employer plan policy, Congress' history of governing these plans and the bill's other benefits-related components.

Relief or Risk?

When Bill Kadereit's retiree advocacy group caught wind of the American Rescue Plan's intent to give single-employer plans 30 years to make up funding losses, thereby nixing the current 15-year deadline, it sprung into action.

The group — the National Retiree Legislative Network, which represents roughly 2 million retirees and which Kadereit has led for more than a decade — urged its members to write to Congress. In a call to action sent to members Feb. 9, the group called the proposal part of the government's "history of harming single-employer defined-benefit pension plans by making it possible for plan sponsors to underfund their plans."

Asked to simply explain the risks associated with extending single-employer plans' deadline for making up losses, Kadereit didn't mince words: "Increased risk of failure of a pension plan," he told Law360.

"The risk is like what happened with Delphi, where they allowed their funding to drop significantly and then it went into bankruptcy," Kadereit said, referring to the auto parts manufacturer and former General Motors subsidiary that filed for bankruptcy in 2005 and terminated a pension plan for over 20,000 salaried employees in 2009.

Those employees have been fighting for over a decade to get their pensions restored, most recently suffering a loss in the Sixth Circuit.

When Congress extends the deadline for pension plans to make up losses, employers have significantly less incentive to fund their plans, Kadereit said. This leads to less stability in the short term, which federal employees acknowledged in a report prepared by the Congressional Research Service on the American Rescue Plan's pension provisions.

"Funding relief can also result in plans being less well-funded," said the Feb. 23 report by CRS employees Elizabeth A. Myers and John J. Topoleski.

Management-side benefits attorneys say upping plans' time to make up losses may decrease plans' short-term stability while increasing their long-term stability.

"If you slow down required contributions, there's less money in the plan, so someone could say it's less stable," said David Levine, a principal at Groom Law Group. "At the same time, if you slow down contributions and allow them to be spread more evenly over time, an employer may be more willing to keep up with the plan."

After all, the American Rescue Plan "doesn't allow [employers] to underfund the plans. It just gives them a longer period of time to make up for the loss incurred," said Timothy P. Lynch, the senior director of Morgan Lewis & Bockius LLP's government relations and counseling practice.

But Kadereit said the risk of underfunding remains, because companies get into the habit of putting less money into their pension plans absent a legal requirement to do so.

"Companies with weak financials are purposely not funding these plans when their finances are good, because there's no obligation any longer," Kadereit said.

Save Our Savings

This isn't the first time Congress has granted so-called funding relief to single-employer plans.

"It's the same issue we've had for some time," Kadereit said, saying his retiree group has been fighting Congress on this point since the early 2010s. "Coming out of the deep recession in 2012, when interest rates plunged, companies appealed to have their pension plan obligations reduced significantly."

In response, Congress passed the Moving Ahead for Progress in the 21st Century Act, better known as MAP-21, the same year. Though predominantly a transportation bill, authorizing funding for highway repairs, the bill contained a provision allowing plans to change the way they calculate their minimum funding requirements, in a way that was thought to generally lower those requirements, Kadereit said.

In previous years, Congress had cut the annual maximum contribution limits for retirement plans in a move that the benefits industry saw as an attempt to offset other costs in a budget bill.

"Over the years, retirement [legislation] has been increasingly used — and it's understandable — as a budgetary tool," Groom Law's Levine said.

Concerned about the direction Congress was heading on this, consumer protection and benefits industry groups formed the Save Our Savings Coalition in 2017 to fight the use of this tactic going forward, knowing that a tax reform bill was just around the corner.

SOS' goal was to communicate to Congress that "we don't want you to pull revenue from the retirement system to fund other priorities," as Levine put it. The group spent $340,000 lobbying on this issue in 2017, according to public records.

"The retirement security pot of money is pretty big in the United States, so if policymakers are looking for revenue to do a revenue-neutral tax bill, for example, it's a logical place for them to look," Jim McCrery, a former federal lawmaker from Louisiana and coalition member, told CNBC in 2017. He said lawmakers held a "misguided" notion that the American retirement system was a piggy bank they could pull from at will in funding bills.

The SOS Coalition succeeded in getting two retirement-related provisions removed from the tax reform bill: one that would have limited annual employee contributions to 401(k) plans to $2,400 per employee, and another that would have stopped allowing workers to make those contributions on a pre-tax basis.

COBRA and COLA

Aside from giving plans more time to make up funding shortfalls and rescuing struggling union pension plans, the American Rescue Plan contains two other notable benefits-related provisions.

The first would freeze annual cost-of-living adjustments, or COLAs, to the maximum contribution limits for 401(k) plans and pension plans, which are $58,000 and $230,000, respectively, in 2021.

Attorneys say this provision was placed in the law to offset the government's spending in other areas in the massive COVID-19 relief bill. Indeed, the CRS estimates that this provision and the funding deadline extension will save the government $22.8 billion.

"If you say you're going to suspend the COLA, you're projecting that the revenue in taxes is going to go up, because people can put less money in their tax-savings vehicles, so [lawmakers] can claim that as a plus for the budget," Levine said.

The American Rescue Plan's second benefits-related provision, contained in the Senate version of the bill, would commit the government to fully covering health insurance premiums for laid-off workers until Sept. 30. Those premiums are called Consolidated Omnibus Budget Reconciliation Act, or COBRA, premiums.

On March 1, the Senate parliamentarian, an official who decides which measures qualify for inclusion in budget bills, OK'd the COBRA language to remain in the American Rescue Plan.

Senate Finance Committee Chair Ron Wyden, D-Ore., praised the official's decision, saying "workers who have been laid off need affordable health care for their families now more than ever."

--Editing by Abbie Sarfo.