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An Employer's Guide To 'Composite' Retirement Plans

By **Emily Brill**

Law360 (August 7, 2020, 3:11 PM EDT) -- A proposal tucked into the House coronavirus relief package would create a new type of ERISA retirement plan called a composite plan.

Neither a defined-benefit plan, like a traditional pension, nor a defined-contribution plan, like a 401(k), the "composite plan" combines elements of both in an attempt to create a securely funded plan governed by the Employee Retirement Income Security Act that guarantees lifetime payments for union retirees

Could composite plans live up to that promise? That remains to be seen. Unions themselves are divided on the idea, which is contained in the bipartisan GROW Act that cleared the House in May as part of coronavirus legislation. The Senate did not include the GROW Act in its own coronavirus relief proposal, released July 27.

The issue has taken on new urgency in light of the predicted collapse of the existing multiemployer pension system by 2026, the year the federal pension insurer anticipates it will run out of money after several large plans become insolvent. Here, Law360 has created a guide for employers looking to understand the composite plans created by the GROW Act.

What Are Composite Plans?

A composite plan is a new type of retirement savings vehicle designed to serve unionized workforces that currently pay into multiemployer pension plans.

Conceptualized in 2013 by the Retirement Security Review Commission, a group of labor and management representatives who met for 18 months to brainstorm solutions to the multiemployer plan funding crisis, the composite plan would introduce elements of a 401(k) to the traditional multiemployer pension plan.

Employers would pay into the plan at a fixed rate, like a 401(k), and retirees would receive monthly benefits for life calculated according to a formula, like a pension plan. Plan trustees — a combination of labor and management representatives — would set that formula.

"The goal here is that contributions going in look like a 401(k), and going out look like a pension plan," said benefits attorney Robert Kaplan, a member at Cozen O'Connor.

Composite plans must stay funded at 120% of the level needed to pay benefits, starting from the first year the plan exists. Plans that fall below this level must make changes, choosing their next move based on a remedial action plan set by the trustees.

That action plan would lay out a step-by-step process for regaining full funding, with measures gradually increasing in severity. For example, trustees could first eliminate early retirement subsidies. Next, they could increase employers' contributions, and, finally, they could cut benefits. John "Rocky" Miller, a benefits partner at Cox Castle & Nicholson LLP who served on the commission, anticipates that cuts would be a last resort for most trustees.

"You're guaranteed a benefit, and it's obligated to be funded at a certain level, and if we have a depression for 10 years, the benefits get adjusted," Miller said

Lower Litigation Risk

For employers, composite plans are less risky than both 401(k) plans and multiemployer pension plans, attorneys say.

The plans carry a lower litigation risk than a 401(k) because they are structured more like pension plans, with a set benefit guaranteed at the end, attorneys say. The U.S. Supreme Court's June decision in Thole v. US Bank greatly limited workers' ability to sue such plans, with the justices ruling that lawsuits over plan fees and investments are irrelevant when these expenses don't affect workers' retirement checks.

Plus, in a composite plan, "plan assets are professionally managed without the fees associated with individual accounts, resulting in far fewer investment fees to the plan," and making fee lawsuits even less of a possibility, said Michelle McCarthy, a partner at Morgan Lewis & Bockius LLP who leads the firm's Southern California benefits practice.

Composite plans also dispense with withdrawal liability, the bill sent to companies that depart multiemployer plans. This bill, which requires companies to pay for a portion of the plan's obligations, is potentially the riskiest aspect of multiemployer plan participation for employers, attorneys say.

"One of the reasons employers do not want to get into multiemployer plans is because there's this concept of withdrawal liability," Kaplan said. "Those can be huge liabilities. There's no withdrawal liability concept with these [composite] plans."

For employees, on the other hand, the risk level of composite plans is somewhat unclear. The plans are thought to be less risky than 401(k)s, which promise neither a set level of benefits nor lifetime retirement income. The composite plans require overfunding, leading some attorneys to believe they are safer than multiemployer plans.

But they aren't backed up by the Pension Benefit Guaranty Corp. — the federal government's insurance program for pension plans — if they fail, leading some unions to believe they're less safe. Those unions also worry that lack of withdrawal liability will lead employers to quit plans without consequence.

"It shifts the risk from the employer; they would end up with no risk. They shift the risk over completely to the worker," said Chuck Mack, the chair of the Western Conference of Teamsters Pension Trust, which opposes the GROW Act.

Some attorneys, like Miller and Kaplan, said the 120% funding requirement is likely a surer safeguard for the plans' solvency than the underfunded PBGC, which is on track to run out of money by 2026 unless Congress acts.

Michael Congiu, a shareholder at Littler Mendelson PC who works with multiemployer plans, said this sentiment certainly makes sense in the abstract, but how it will play out in practice is still unknown.

"The concern is that if another group of plans is going to be backstopped by the PBGC, that is additional potential mouths to feed, and there's concern that there's not enough money to go around for them. In terms of will, or should, the PBGC ultimately act as a backstop, I don't know," Congiu said. "It's far simpler to project that a plan will remain over a certain funded percentage than for that to actually play out in practice."

Unions Don't See Eye to Eye

Unions are split on composite plans, which some see as the only way to save the multiemployer pension system and others see as an inferior option that would weaken retirement security.

Unions that have come out against the plans include United Steelworkers, Service Employees International Union, the United Food and Commercial Workers International Union and the International Association of Machinists & Aerospace Workers International Longshore and Warehouse Union.

Unions that support the plans include the International Union of Operating Engineers, Laborers' International Union of North America and the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers.

The unions whose multiemployer plans are struggling the most, including the Teamsters' Central States Pension Fund, are neutral on the GROW Act. They wouldn't be affected by it, as adopting a composite plan is only an option for the trustees of well-funded plans.

But despite their neutral stance, those unions have encouraged the unions resisting composite plans to drop their opposition if Congress won't pass a fix for the multiemployer system without the GROW Act.

"Democratic and Republican leaders in Congress have made it … clear that the GROW Act is an essential component of any legislation that would end this crisis," Central States' trustees wrote in a statement released in late July. "Actively opposing the GROW Act means opposing relief for Central States, supporting draconian benefit cuts for our 360,000 participants, and endorsing the same for 1.4 million participants across the nation whose plans are also in dire straits. We hope common sense prevails."

--Editing by Jill Coffey and Rebecca Flanagan.

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