The Multiemployer Pension Reform Act of 2014

Results and Changes Three Years After Passage

Peter J. Leff
Mooney, Green, Saindon, Murphy & Welch, P.C.
1920 L Street, NW, Suite 400
Washington, DC 20036

Legislative History

- Representative John Kline (R-MN) and Representative George Miller (D-CA) offered the “Multiemployer Pension Reform Act of 2014” (MEPRA) as an amendment to the omnibus government funding bill.
- The House of Representatives approved the bill on December 11, 2014.
- On December 13, 2014, the Senate passed the MEPRA as part of the Consolidated and Further Continuing Appropriations Act.
- The text of MEPRA is designated as Division O of the larger omnibus funding bill.
- President Obama signed the omnibus government budget and spending bill, which included MEPRA, into law on December 16, 2014.
- Most of MEPRA’s provisions become effective for the plan year that commences after December 31, 2014.

Overview of Changes

- Permanently extends certain Pension Protection Act (PPA) provisions that were scheduled 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 reduce benefits for active, deferred 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 $13 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.

Enforcement of the Act

- The Secretary of the Department of the 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.

Amendments to Pension Protection Act of 2006 (PPA) - Sections 101-103

- Repeal of the December 31, 2014 sunset of PPA funding rules.
- A plan that is projected to move into critical status within the next five years can elect to enter critical status immediately.
- Plans will now be required to project their zone status five years into the future.
- The “revolving door” for critical status is eliminated (i.e., a plan that has come out of red zone does not need to disregard its automatic amortization extension in its annual certification).

Mergers (Section 121)

- PBGC is now authorized to promote and facilitate the merger of two or more multiemployer plans.
- PBGC can provide financial assistance for a plan merger, provided the following conditions are met:
  - One plan must be in "critical and declining status"
  - Financial assistance will reduce the PBGC's long-term loss
  - Merger is necessary for the merged plan to become or remain solvent
  - Existing PBGC financial assistance obligations will not be impaired
  - The assistance is paid out of the PBGC's basic guarantee fund

Remediation Measures for Deeply Troubled Plans (Section 201)

- If a plan is in “critical and declining status,” the plan may “suspend” (reduce) accrued benefits in accordance with the law.

Definition of "Critical and Declining Status"

- The plan is projected to become insolvent within the current plan year or any of the 14 succeeding plan years; or
- The plan is projected to become insolvent within any of the 19 succeeding plan years and the plan has a ratio of inactive participants to active participants that exceeds 2 to 1 or the funded percentage of the plan is less than 80 percent.

Suspension of Benefits

- Definition – 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.
- Benefit suspensions are permitted if they are both necessary and sufficient to prevent insolvency, following approval by the Secretary of the Treasury and ratification by participants and beneficiaries.
- Benefits may not be reduced below 110% of the PBGC guarantee.
- Reductions cannot materially exceed the level necessary to avoid insolvency.
- Reductions must be equitably distributed across the participant and beneficiary population (several factors can be utilized, such as withdrawal date and whether a withdrawn employer paid its EWL), with additional restrictions on the reduction in benefits payable to retirees age 75 and over. Reductions do not apply to retirees age 80 and over.
- Disability pensions may not be reduced.

Procedure for the Suspension of Benefits

- Plans with 10,000 or more participants must appoint a retiree as a "retiree representative" who advocates on behalf of the retired and deferred vested participants and beneficiaries.
- Notice to participants, beneficiaries, employers and unions must be provided at the same time as the application is submitted for approval by the plan to the Secretary of Treasury.
- An application by a plan for benefit suspension is deemed to be approved after 225 days if Secretary of Treasury has not approved or denied the application.
- Participants and beneficiaries vote on the proposed suspension of benefits.
  - Suspension of benefits goes into effect following the vote unless a *majority of all* participants and beneficiaries of the plan vote to reject the suspension.
  - Secretary of Treasury can implement a suspension of benefits after an adverse vote if it determines that the plan is a "systematically important plan."
    - A systemically important plan is a plan which the PBGC projects the present value of projected financial assistance payments exceeds $1 billion if suspensions are not implemented (this amount is indexed for inflation for 2016 and beyond).

Conditions for Suspension of Benefits

- Plan certifies that all reasonable measures to avoid insolvency have been taken (and continue to be taken during the period of the benefit suspension).
- Plan actuary certifies that the plan is projected to avoid insolvency as a result of the benefit suspensions.

Partitions (Section 122) Overview

- The PBGC's partition authority was expanded under MEPRA. Partition no longer only applies to orphan beneficiaries associated with a bankrupt employer.
- If, after reducing benefits to 110% of the PBGC guarantee for all participants, the plan is still projected to be insolvent, the PBGC, upon plan sponsor application, can order that sufficient liabilities can be transferred from the plan to a new plan so that the original plan will no longer become insolvent.
- The plan will pay benefits (110% of the PBGC guarantee) to participants and beneficiaries left in the original plan.
- The PBGC will then pay PBGC guaranteed benefits to the participants and beneficiaries transferred to the partitioned plan.
- The partitioned plan is deemed a successor plan sponsored and administered by the Board of Trustees of the original plan.
- The original plan will pay the 10% difference between the PBGC guaranteed benefit and the 110% of that amount payable to participants so that the total benefit remains what it would have been under the original plan. The original plan is also required to pay the PBGC premium on the participants in both plans for the succeeding 10 years.

Eligibility for a Partition

- In order for the PBGC to authorize a partition, the following conditions must be met:
  - The plan is in critical and declining status;
  - The PBGC determines that the plan has taken “all reasonable measures” to avoid insolvency;
  - The plan will suspend benefits for all participants and beneficiaries to 110% of the PBGC guarantee;
  - Partition will reduce the PBGC’s long-term loss with respect to the plan;
  - Partition is necessary for the plan to remain solvent; and
  - The PBGC certifies to Congress that its ability to meet existing or projected multiemployer plan obligations will not be impaired by the partition.

Procedure for a Partition

- Must apply to the PBGC.
- PBGC must make a determination within 270 days after application is filed.
- 30 days after the application is filed, the plan must notify participants and beneficiaries.
- No requirement that participants and beneficiaries vote on the partition.

MPRA Results

- 20 applications for a Suspension of Benefits submitted to Treasury under MPRA:
  - 4 have been approved by the Department of Treasury
  - 10 withdrawn
  - 5 denied
  - 3 under review
- 4 applications for a Partition submitted to PBGC under MPRA:
  - 1 has been approved by PBGC
  - 2 withdrawn
  - 1 denied

Initial Attempts to Obtain Suspension of Benefits Relief under MPRA were Unsuccessful

- Treasury's initial rejections of Suspension of Benefits applications were based on the following determinations:
  - Investment return assumptions (7.5%/7.25%) were not reasonable
  - Entry age assumption (32 years old) was not reasonable
  - Suspension of benefits not equally distributed
  - Failure to obtain partition approval from PBGC
  - Mortality and mortality improvement assumptions (use of a 1983 mortality table) were not reasonable
  - Hours of service assumption (CBUs will remain unchanged for 30 years) is not reasonable
  - Zero-Take up assumption regarding spousal survivor benefits was not reasonable
  - Disability and retirement assumptions were unreasonable
  - Assumption regarding the probability of benefit commencement for terminated vested participants was not reasonable

IRS Issues Revenue Procedure 2017-43

- Modification of the Suspension of Benefit submission and notice requirements in light of the experience of the Treasury Department in processing applications.
- For applications submitted on or after September 1, 2017.

Changes set forth in Rev. Proc. 2017-43

- If the Treasury Department identifies an error in the application after it is submitted, then the Treasury Department may request that the plan sponsor provide additional materials to correct the error (instead of simply rejecting applications it finds fail to satisfy the MPRA suspension of benefits criteria).
- The projected withdrawal liability payments that are included as part of the projection of the plan's available resources, and as part of the support for the certification that the plan is projected to avoid insolvency (taking the proposed suspension into account), must be separately identified as projected payments attributable to prior withdrawals and projected payments attributable to expected future withdrawals.
- Sample calculations only must be provided for an individual currently receiving benefits, a contingent beneficiary of an individual currently receiving benefits, and a future retiree.
- The age categories for which sample calculations with respect to the age-based limitation have been clarified and simplified.
- Less information is required to show that the proposed suspension of benefits is equitably distributed for applications filed in connection with a proposed plan partition.

Changes set forth in Rev. Proc. 2017-43 (continued)

- The different categories of individuals to be provided sample notice as part of an application has been clarified.
- The descriptions of the actuarial assumptions to be used with respect to certain illustrations and projections included in the application has been consolidated but additional detail regarding those assumptions must be provided.
- A narrative statement of the reasons the plan is in critical and declining status must be included with the application.
- The accountant's report from the most recently filed Form 5500 must be included with the application.
- The date on which the Treasury Department indicated that the application is a candidate for resubmission review must be indicated, if applicable.
- Minor clarifications were made to the Model Notice of Application for Approval of a Proposed Reduction of Benefits, the power of attorney, the declaration of representative form, and the application checklist.

Peter J. Leff

Mooney, Green, Saindon, Murphy & Welch, P.C.

1920 L Street NW, Suite 400

Washington DC, 20036

(202) 783-0010

pleff@mooneygreen.com