MULTI-ELERT®
A SERVICE OF THE NCCMP

VOLUME XX • ISSUE 2
MAY 21, 2020

TOPIC: HOUSE PASSES HEROES ACT WITH MULTIEMPLOYER HEALTH AND PENSION PROVISIONS

EXECUTIVE SUMMARY: NCCMP IS PLEASED TO REPORT THAT ON MAY 15TH, THE U.S. HOUSE OF REPRESENTATIVES PASSED THE HEROES ACT. IN ADDITION TO ADDRESSING A NUMBER OF OTHER COVID-19 PRIORITIES, THIS BILL PROVIDES FOR FULL FEDERAL SUPPORT FOR COBRA HEALTH INSURANCE PREMIUMS AS WELL AS RELIEF AND REFORM FOR MULTIMEPLOYER PENSIONS AND THE PENSION BENEFIT GUARANTY CORPORATION. PLEASE SEE THE ATTACHED SUMMARY OF THE PROVISIONS IMPACTING MULTIEMPLOYER HEALTH AND PENSION PLANS.

THE COVID-19 PANDEMIC HAS RESULTED IN AN UNPRECEDENTED COLLAPSE OF THE U.S. ECONOMY, PUTTING MORE THAN 38.6 MILLION HARD WORKING AMERICANS OUT OF WORK IN THE NINE WEEKS ENDING MAY 16TH. THE FULL IMPACT OF THE ECONOMIC COLLAPSE, THE LOST EMPLOYER CONTRIBUTIONS AND THE SERIOUS MARKET IMPACT ON OUR INVESTMENT PORTFOLIOS WILL NOT BE KNOWN FOR SOME TIME. WHAT WE DO KNOW WITH CERTAINTY IS THAT OUR PENSION AND HEALTH PLANS, AND THEIR PARTICIPANTS AND EMPLOYERS WILL BE SEVERELY IMPACTED.

THE HEROES ACT IS A SERIOUS RESPONSE TO THE COVID-19 PANDEMIC AND WE APPRECIATE THE HARD WORK OF HOUSE SPEAKER NANCY PELOSI, HOUSE LEADERSHIP, AND THE MEMBERS. WE LOOK FORWARD TO WORKING WITH THE U.S. SENATE ON A BIPARTISAN AGREEMENT.

PURPOSE:	INFORMATIONAL
CATEGORY:	LEGISLATION
ISSUER:	NCCMP
TARGET AUDIENCE:	TRUSTEES OF AND PLAN ADVISORS TO MULTIEMPLOYER PENSION AND HEALTH PLANS
MORE INFORMATION	TEXT OF THE HEROES ACT
SEND COMMENTS TO:	*nccmp@nccmp.org*
REFERENCE:	VOL. XX, ISSUE 2

815 16th Street, N.W., Washington, D.C. 20006
e-mail nccmp@nccmp.org

‘‘Health and Economic Recovery Omnibus Emergency Solutions Act’’ or the ‘‘HEROES Act’’

Passed the House May 15, 2020

- Division C, Title III includes provisions governing private health insurance.
- Division D, Title I includes provisions providing relief to multiemployer pension plans
- Division N, includes enabling provisions for a new optional retirement plan for multiemployer plan Trustees (known as “GROW Act plans” or “composite plans”)

Summary of Multiemployer Healthcare Provisions (Division C, Title III)

Coverage of COVID-19 Related Treatment with no Cost-Sharing

Group health plans and health insurance issuers, including grandfathered plans, must cover without any cost-sharing, medically necessary items and services, including telehealth, for individuals diagnosed with COVID-19 or presumed to have COVID-19 to treat or mitigate the effects of the disease.

HHS/DOL/Treasury must issue guidance specifying applicable diagnoses and medically necessary items and services that must be covered. The items must include items ordinarily covered under the terms of the GHP, but also items or services relevant to the treatment or mitigation of COVID-19. Includes a private right of action.

Requiring Prescription Drug Refill Notifications During Emergencies

Group health plans and health insurance issuers that offer prescription drugs must notify plan participants whether the plan will waive time restrictions on prescription drug refills during the public health emergency period.

Enhanced COBRA notices

The bill would codify additional requirements to be included in COBRA notices (most of which are already required in DOL guidance).

COVID Testing prior to Families First Coronavirus Response Act ("FFCRA")

Would require coverage of COVID testing prior to enactment of the FFCRA and Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").

Paid Sick Leave and Emergency Family and Medical Leave

The FFCRA emergency paid leave and Families and Medical Leave Act of 1993 ("FMLA") expansion would be expanded from small employers (under 500 employees) to all employers.

Special Enrollment Period

Amends the ACA to create an additional special enrollment period in the Exchanges/Marketplace.

COBRA Premium Subsidies

Provides COBRA premium assistance to cover 100 percent of the health premiums owed by workers from March 1, 2020 through January 31, 2021. Workers would be eligible if they have a reduction in hours, involuntary termination, or furlough (reduction in hours for worker who remains eligible for coverage). The amount of assistance for an individual on furlough is different from the COBRA amount and is based on the employee's payment for coverage while employed.

The payroll tax credit would be refundable and advanceable.

Plan sponsors would have to notify individuals of the availability of the premium subsidy and provide a new COBRA extended election period for qualified workers. The subsidy would end if the individual obtains coverage under another group health plan, Medicare, or an Exchange or Marketplace plan.

Risk Corridor Program for Self-Insured Group Health Plans and Health Insurance Coverage Offered in the Large Group Market

This provision was added as part of the managers' amendment in the Rules Committee, and creates a risk corridor program for 2020 and 2021 in which if a plan's costs other than administrative costs exceed 105% of the "target amount," the federal government will pay the plan 75% of the excess amount. The reinsurance program is paid for through an appropriation, not through fees on funds.

The program does not apply to grandfathered health plans, or to excepted benefits such as separate vision or dental coverage.

The "target amount" appears to be the expected cost to the plan for the preceding plan year, taking into account COBRA premium for the preceding year, reduced by any administrative costs for the preceding plan year and increased by 5%. This may reduce the applicability of this provision to multiemployer plans for 2020.

For fully-insured plans, any payment under the program is added to premium for medical loss ratio (MLR) purposes.

There is a separate similar reinsurance program for small group and individual market plans, as well as one for Medicare Advantage plans.

Summary of Multiemployer Pension Provisions (Division D, Title I)

Special Partition Program

A new special partition program is set up at the Pension Benefit Guaranty Corporation ("PBGC") to help deeply troubled plans. The program would be available to plans that are or become eligible in any plan year beginning in 2020 through 2024. The special partition program would be a separate fund at the PBGC than the general multiemployer fund, and funds are appropriated from the general fund to pay for the program in "such amounts as are necessary." Taken together, this means that the special partition program is not paid for by premiums.

Plans that satisfy any of the following criteria are eligible for the special partition program:

- Plans in Critical and Declining status in any plan year beginning in 2020 through 2024
- Plans in Critical status in any plan year beginning in 2020 through 2024 and has a modified funded percentage of less than 40% (market value of assets divided by current liability) and worse than 2:3 active to inactive ratio.
- Plans for which a Multiemployer Pension Reform Act of 2014 ("MPRA") suspension has been approved
- Plans which became insolvent after December 16, 2014 and have not terminated by the date of enactment

Partitioned liabilities would be determined without regard to the PBGC guarantee level with the goals of ensuring that:

- The partitioned plan is solvent for 30 years with no benefit reductions
- The plan's funded percentage at the end of the 30-year period is at least 80%

Assistance is reviewed every 5 years and adjusted as necessary to ensure that the multiemployer plan meets these goals.

Any benefits that were suspended under MPRA are restored, and prior suspended benefits are repaid either as a lump sum or in equal monthly installments over 5 years.

For employers in partitioned plans, withdrawal liability is calculated including plan liabilities that are partitioned for 15 years following the date of the partition.

PBGC is required to issue guidance for partition applications but must accept plan actuary assumptions unless they are "clearly erroneous." PBGC can impose only "reasonable" conditions on the following for partitioned plans: accrual rates, asset allocations, contribution rates, diversion of contributions to another retirement plan, or withdrawal liability. The corporation may <u>not</u> impose conditions on reductions in benefits, plan governance including selection of, removal of, or terms of contracts with trustees, actuaries, investment managers, or other service providers, or any funding rules.

There is substantial Congressional and Administration oversight of the PBGC partition process. PBGC must annually report to relevant Senate and House Committees on status of program. GAO is directed to report to Congress on the actions of the Corporation. PBGC is directed to create a public website as a portal to information on the program for Trustees. The Inspector General is allocated funding to audit the implementation and administration of the program.

MPRA is repealed prospectively.

Relief for All Other Multiemployer Plans

Similar to provisions under the Worker Retiree and Employer Recovery Act, plans would be permitted to “freeze” their zone status for the first plan beginning on March 1, 2020 through February 28, 2021, or the next succeeding plan year. Alternatively plans may elect to enter Endangered or Critical status, and their required Funding Improvement or Rehabilitation Plans could use a funding improvement or rehabilitation period of 15 years rather than 10 years. Plans that are currently in Endangered or Critical Status are not required to update Funding Improvement or Rehabilitation Plan schedules until the same year.

Similar to provisions under the Pension Relief Act of 2010, plans would be permitted to amortize investment losses in the two plan years following February 29, 2020 over 30 years in the development of the funding standard account. In the development of the actuarial value of assets, investment losses in the two plan years following February 29, 2020 may be reflected over 10 years, and the corridor for the development of the actuarial value of assets

Plans that are part of the special partition program are not eligible for these types of smoothing relief.

PBGC Premiums and Guarantees

The PBGC multiemployer guarantee is increased to 100% of the first $15 of accrual plus 75% of the next $70 of accrual per year of service (for a maximum of $24,300 per year for 30 years of service). The guarantee would be indexed to increase with wages each year. Under current law, the maximum guarantee is $12,870 per year for 30 years of service and requires an act of Congress to increase.

Multiemployer PBGC premiums are unchanged.

Summary of Giving Retirement Options to Workers Act (Division N)

SEC. 140001. Short Title

- “Giving Retirement Options to Workers Act of 2020” or the “GROW Act”

SEC. 140002. Composite Plans

Multiemployer Composite Plan Definition. Adds Section 801 to the Employee Retirement Income Security Act (ERISA) and Section 437 to the Internal Revenue Code (IRC) to:

- Establish the “composite plan” as a new kind of multiemployer pension plan that has certain attributes of a defined benefit plan and certain attributes of a defined contribution plan but is neither of those types of plan.
- Require that only one multiemployer defined benefit plan is treated as a legacy plan with respect to a composite plan except if there is more than one legacy plan following a merger or transfer.

- Require that benefits under a composite plan be:
    - Objectively calculated under a plan formula determined by the plan's trustees, and
    - Provided in the form of a life annuity (except for small cash outs).
- Require that plan contributions for the first year be at least 120 percent of the normal cost for the plan year and that there be:
    - An annual valuation of the plan's liabilities;
    - An annual actuarial certification of the plan's current and projected funded ratio;
    - Corrective action taken in the current year through a realignment program if the plan's projected funded ratio is below 120 percent; and
    - An annual notice to participants describing the participant's benefits and explaining that benefits are subject to reduction based on the plan's funded status.
- Require that the board of trustees of a composite plan include at least one retiree or beneficiary in pay status during each plan year after the first plan year in which at least 5% of the participants are retirees or beneficiaries in pay status.
- Allow a composite plan to be a stand-alone plan or a component of an existing multiemployer defined benefit plan provided that the defined benefit plan is not, and will not be in the current or any of the succeeding five years, in critical status
- Provide that, for an existing multiemployer defined benefit plan to adopt a composite plan as a component, the composite plan must apply to all collective bargaining agreements and participants, and no additional benefits under the defined benefit plan can accrue on or after the effective date of the composite plan component. The effective date is:
    - A single date for all adopting collective bargaining agreements that is the first day of a specified plan year; or
    - Separate dates for each collective bargaining agreement, where each such date is based on the particular agreement's termination or reopening, or on an earlier agreed-to date; and
    - In either case, no later than the first day of the fifth plan year after the plan year in which the composite plan component was adopted.
- Require that, for a multiemployer plan that has a composite plan component and a defined benefit plan component:
    - The applicable provisions of ERISA and the IRC shall apply to each component as if each was a separate plan; and
    - The assets of both components will be held in a single trust, with the assets of each component accounted for separately and held and managed for the exclusive benefit of that component's participants and beneficiaries. The assets of one component cannot be used to pay benefits under the other component.
- Require that the plan sponsor notify the Secretary of Labor of its intent to establish a composite plan or component 30 days in advance of the effective date of such action.
- Provide that the minimum funding and insolvency rules do not apply to a composite plan and that a composite plan is treated as a defined benefit plan unless a different treatment is provided.

SEC. 802. Funded Ratios, Actuarial Assumptions. Adds Section 802 to ERISA and Section 438 to the IRC to:

- Require actuarial certification each year of the composite plan's current funded ratio (the current value of the plan's assets and liabilities) and projected funded ratio (a projection of the plan's assets and liabilities in 15 years).
  - o Projections may consider reasonable contribution increases beyond terms of collective bargaining agreements up to 2.5% per year unless it would be unreasonable to assume contributions would increase by that amount.
  - o Actuarial assumptions and methods must each be reasonable and in combination offer the actuary's best estimate of anticipated experience, with any changes certified and explained in the annual report (Form 5500).
  - o The value of the plan's assets shall be the fair market value; normal cost and plan liabilities shall be based on most recent actuarial valuation and unit credit funding method.

SEC. 803. Realignment Program. Adds Section 803 to ERISA and Section 439 to the IRC to:

- Require the trustees to take remedial action in a plan year if the projected funded ratio for the plan year is below 120% by adopting a realignment program intended to return the projected funded ratio to 120%. The program must be updated every year until the projected funded ratio is at least 120%.
  - o The realignment program consists of several levels of options, graded in severity, to be undertaken by the trustees or proposed to the bargaining parties to enable the plan to achieve a 120% projected funded ratio.
  - o The least severe (first level) options include proposed contribution increases, reductions in rate of future accruals (but not below 1% of contributions on which benefits are based), and modification or elimination of adjustable benefits such as early retirement subsidies or recent benefit increases.
  - o If the first level options are not sufficient, the trustees may consider adding reductions in accrued benefits for participants not yet in pay status or reductions of non-core benefits (e.g., cost of living adjustments) for participants in pay status. Core benefits are defined as accrued benefits payable in the normal form of annuity commencing at normal retirement age and determined without regard to any early retirement benefit, subsidies, or other rights or features, and any cost- of-living increases effective after the date of retirement.

- o If the first and second level options together are not sufficient, additional reductions may include reducing rate of future accruals (without regard to the 1% limitation), or reduction of retiree benefits (including core benefits) until the plan's projected funded ratio is at least 120% or, at the Trustees' election, the plan's projected ratio is at least 100% for the following year and the current funded ratio is at least 90%.

- Require a notice to participants, beneficiaries, bargaining parties and the Secretary of Labor no later than 30 days after the certification that the projected funded ratio is below 120% and that remedial steps, including contribution increases or benefit reductions may be necessary.
- Require a notice to participants, beneficiaries, and bargaining parties about reductions to future benefit

accruals or to adjustable benefits or core benefits at least 180 days before the general effective date for all participants and beneficiaries

- Require the Secretary of Labor to issue model notices and permit electronic delivery.

- ERISA does not allow accrued benefits in the legacy plan to be reduced, except for adjustable benefits as part of a rehabilitation plan, or as part of a plan insolvency, or a MPRA application (which is repealed as part of this legislation).

SEC. 804. Limitation on Increasing Benefits. Adds Section 804 to ERISA and Section 440 to the IRC to:

- Allow trustees to increase benefits by 3%, subject to limitations including:
  - The plan's current funded ratio must be at least 110% (not including increases);
  - The current funded ratio is at least 100% and projected funded ratio is at least 120% (including increases); and
  - Expected contributions for the current plan year cover at least 120% of benefits earned that year
- The 3% cap is lifted if, after taking benefit increases or new benefits into account, the current funded ratio is at least 140% and the projected funded ratio is at least 140%.
- In the event of a benefit increase, the trustees must determine an equitable distribution of benefit increases (as applied to future payments) across the participant and beneficiaries taking into account benefits previously reduced for retirees.

SEC. 805. Composite Plan Restrictions to Preserve Legacy Plan Funding. Adds Section 805 to ERISA and Section 440A to the IRC to:

- Specify that a defined benefit plan will be a legacy plan with respect to the composite plan under which the employees who were eligible to accrue benefits under the defined benefit plan become eligible to accrue a benefit under such composite plan.
- Specify that an employee is eligible to accrue a benefit under a composite plan as of the first day on which the employee completes an hour of service under a collective bargaining agreement that provides for contributions to and accruals under the composite plan in lieu of accruals to the legacy plan.
- Prohibit the trustees of a composite plan from accepting a collective bargaining agreement:
  - With a defined benefit plan that has been certified to be in critical status for the current year or any of the five succeeding years; or
  - That does not require all employers to make transition contributions to the legacy plan, regardless of whether employees of that employer previously accrued benefits under the legacy plan.
- Prohibit employees of an employer that enters into a collective bargaining agreement after date of enactment that provides for the cessation of contributions to a multiemployer plan from earning benefits under a composite plan for a 5-year period beginning on the date the employer entered into the collective bargaining agreement

- Provide for transition contributions to the legacy plan, at the rate or rates, determined by the legacy plan's actuary that:
  - Fund the normal cost for the plan year;
  - Amortize the plan's initial unfunded liabilities in level installments over 25 years;
  - Amortize subsequent changes in plan's unfunded liability due to experience gains or losses including those due contributions greater or less than those made under the prior transition rate, changes in actuarial assumptions, changes in the legacy plan's benefits, or changes in funding method over 15 years.
- Provide that if the legacy plan is certified to be in endangered or critical status, 25% of the sum of contributions is reserved for future accruals in the composite plan component.
- Provide that employers may make supplemental contributions in addition to transition contributions.
- Provide that transition contributions cease when the legacy plan is fully funded (using PBGC assumptions except for plan's assumptions on benefit start date), has been fully funded for at least 3 of the immediately preceding 5 plan years, and is projected to remain fully funded for at least the following 4 plan years.

SEC. 806. Mergers and Asset Transfers of Composite Plans. Adds Section 806 to ERISA and Section 440B to the IRC to:

- Provide that composite plans may engage in mergers or transfers only with other composite plans, provided that accrued benefits are not lower immediately after the transaction than before and that, in the case of a transfer, the value of assets transferred reasonably reflects the value of amounts contributed with respect to benefits transferred.
- Provide that after a merger or transfer, the legacy plan(s) that the employer contributed to immediately before a merger or transfer is the legacy plan(s) to which it remains obligated to contribute.

ERISA Penalties. Adds language to Section 502. Civil Enforcement of ERISA to:

- Provide that if the trustees of the composite plan fail to adopt a realignment program or to update or comply with the program, the Secretary of Labor, contributing employers, or the union can bring a civil action for an order compelling the trustees to comply.
- Provide that the Secretary of Labor may asses a civil penalty of $1,100 per day against the trustees if the composite plan's actuary fails to timely certify the current or projected funded ratio or in the event the trustees fail to adopt a realignment program.
- Provide that the Secretary of Labor may assess a civil penalty of $100 per day against the trustees for failing to comply with certain required notice provisions related to the composite plan's realignment program.
- Provide that the Secretary of Labor may asses a civil penalty of $100 per day against the trustees for

failing to comply with certain required notice provisions related to the intent to establish or adopt a composite plan or component, as applicable, or related to failures in collective bargaining agreements.

SEC. 140003. Application of Certain Requirements to Composite Plans

Adds language to Title I, Subtitle B Part 1 – Reporting and Disclosure of ERISA to:

- Provide that annual funding notices, annual reports, and pension benefit statements apply to composite plans to the extent provided in Department of Labor regulations.

SEC. 140004. Treatment of Composite Plans Under ERISA Title IV

Adds language to Title IV, Subtitles A, B and E of ERISA to:

- Specify that a composite plan component is not subject to PBGC premium requirements or the PBGC guarantee.
- Specify that contributions to the composite plan component and the legacy plan are not taken into account for purposes of withdrawal liability.
- NOTE: This Act does not change any employer’s responsibility for withdrawal liability to the legacy plan.
- Specify that a legacy plan has no unfunded vested benefits if the plan:
  - Is fully funded (using PBGC’s assumptions, except as otherwise provided);
  - Had no unfunded vested benefits for at least 3 of the last 5 plan years; and
  - Is projected to be fully funded for the next 5 plan years.

SEC. 140005. Conforming Changes

Adds language to various sections of ERISA and the IRC, or both, as applicable, to:

- Provide a special funding rule for a legacy plan that is available when all future accruals under the defined benefit component have ceased and that allows the trustees to combine the outstanding balance of all charge and credit bases and amortize that combined base in level installments over 25 plan years beginning the plan year following the date all defined benefit accruals ceased.

- To permit tax-deductible contributions to the composite plan to the extent the plan’s current funded ratio does not exceed 160%.

- To provide that years of service determined under each of the legacy and composite components are treated as years of service under the other, for employees that satisfy certain requirements.

SEC. 140006. Effective Date

Provides that amendments made by the GROW Act shall apply to plan years beginning after the date of enactment.

We strive to ensure that the information contained in this and every issue of Multi-Elert is correct to the extent information is available. Nevertheless, the NCCMP does not offer legal advice. Plan fiduciaries should rely on their own attorneys and other professional advisors for advice on the meaning and application of any Federal laws or regulations to their plans.

* * * * *

If you have questions about the NCCMP, or about this or other issues of Multi-Elert, please contact the NCCMP, by phone at (202) 737-5315 or by e-mail at nccmp@nccmp.org .