Labor and Employment Alert

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Pension Reform Forces Employers to Consider their Future Participation in Multiemployer Plans

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Many employers in the retail, construction, service, entertainment, manufacturing and transportation industries contribute to multiemployer defined benefit pension plans (MEPs) on behalf of their unionized employees. A large number of these plans are significantly underfunded, are at risk of insolvency and can saddle participating employers with potentially millions of dollars of withdrawal liability if they significantly reduce their contribution obligations or exit the plans. The American Rescue Plan Act of 2021 (ARPA) brought what many stakeholders perceived as welcome news to MEPs that have become insolvent or are in danger of becoming insolvent, in an effort to enable millions of retirees to have a financially secure retirement.

On July 9, 2021, the Pension Benefit Guaranty Corporation (PBGC) issued an Interim Final Rule (IFR) to implement the requirements under Section 9704 of ARPA, "Special Financial Assistance Program for Financially Troubled Multiemployer Plans." The ARPA created Section 4262 of the Employee Retirement Income Security Act (ERISA), a program intended to enhance retirement security for participants of MEPs. Under this program, eligible MEPs receive special financial assistance (SFA) in the amounts required for the each eligible plan to pay all benefits due through the plan year ending in 2051. PBGC's IFR provides guidance on MEP eligibility requirements, the information necessary to demonstrate the amount of SFA to be paid by PBGC, an overview of the application process, and restrictions and conditions on MEPs that receive SFA.

PBGC estimates that the SFA program is expected to assist plans covering more than three million participants and beneficiaries by forestalling insolvency and ensuring the payment of full plan benefits through 2051, including the reinstatement of suspended monthly benefits from MEPs that are insolvent but not yet terminated, or MEPs that suspended benefits pursuant to The Multiemployer Pension Reform Act of 2014 (MPRA). It is estimated that the SFA program will forestall the insolvency of 100 MEPs that would otherwise become insolvent during the next 15 years.

One predominant issue that the ARPA and the IFR do not address, however, is what will happen to eligible plans after 2051, as without further congressional action, MEPs that receive SFA have a high probability of becoming insolvent after 2051. Indeed, PBGC's guidance makes clear that the SFA only provides assistance in the amount

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necessary to ensure that eligible MEPs are able to pay benefits through 2051 (and even then, only if the assumptions used to determine the amount of the SFA are accurate). With this backdrop, stakeholders will need to consider the future viability of MEPs that receive SFA and the likelihood of a post-2051 insolvency.

Congress granted PBGC the authority to promulgate regulations related to reasonable conditions on a MEP's receipt of SFA, including benefit increases, asset allocation, contributions and withdrawal liability. Generally speaking, with regard to conditions on contributions and withdrawal liability, the IFR provides that participating employers will be required to continue the contribution rates in effect on March 11, 2021, and that any employer withdrawal will be determined using mass withdrawal assumptions. Depending on the circumstances, an employer's liability under mass withdrawal assumptions could be exponentially higher than withdrawal liability calculated based on the MEP's current withdrawal liability assumptions. Therefore, employers that participate in eligible MEPs need to consider whether continued participation is in their best interest given the conditions on SFA and the risk that the MEP could go insolvent after 2051. Due to the risk of a post-2051 insolvency, active participants and the unions that represent them will need to consider whether continued contributions and accruals in a plan facing a near certain future insolvency would be better placed in an alternative retirement vehicle. Such friction could lead to an employer's withdrawal from a MEP that receives SFA, triggering withdrawal liability calculated under mass withdrawal assumptions.

Given the likely future insolvency of MEPs that receive SFA (absent additional congressional action), employers should reflect on the following questions when making a decision about their continued participation in a MEP that is eligible for SFA. Each employer's considerations will be different depending on the facts and circumstances, but the following questions are important given the future uncertainty posed by ARPA.

- Are contribution rates and contribution base units expected to increase in the future?
- Is the cost of a pre-SFA complete withdrawal under the MEP's current assumptions plus the provision of an alternative retirement benefit for active participants cheaper than (i) a pre-2051 withdrawal calculated on mass withdrawal liability assumptions or (ii) contributions through 2051 and mass withdrawal liability when the eligible MEP goes insolvent post-2051?
- Is there a reasonable risk that a union representing active participants forces a withdrawal due to ARPA benefiting retirees to the detriment of younger, active participants because of the near certainty that their benefits will be reduced to the PBGC guarantee before, or shortly after, they retire due to a post-2051 insolvency?

Every employer's circumstances will vary, and each of the above considerations will be dependent on issues such as the employer's future business plans, the economic viability of the relevant industry and workforce demographics. To make an informed decision, it will be important for employers to consider their long term business plans, the economics related to providing an alternative retirement plan and their estimated withdrawal liability under the MEP's current assumptions compared to mass withdrawal liability assumptions. Even though the intent of ARPA is to shore up multiemployer plans, employers should be aware that unintended consequences of ARPA and PBGC's IFR could have the opposite effect.