Updates

While the country has been focused on the many social, economic, and political impacts of the coronavirus pandemic over the last year, one of the less-discussed crises was the impending collapse of many critical-and-declining multiemployer pension plans (MEPPs) and the Pension Benefit Guaranty Corporation's (PBGC's) multiemployer insurance program. After the failure of several legislative efforts to restore the solvency of these underfunded MEPPs, including the creation and subsequent dissolution of a Congressional Joint Select Committee on the Solvency of Multiemployer Pension Plans in 2018, few MEPP sponsors, contributing employers, participants, or practitioners believed that a legislative solution would find its way through an otherwise gridlocked Congress.

However, much to the relief (and in many cases, surprise) of MEPPs and their participants and beneficiaries, significant MEPP assistance provisions were built into the American Rescue Plan Act of 2021 (the ARPA; H.R.

1319). Most importantly, the ARPA will establish a special financial assistance program under the PBGC that will allow financially troubled MEPPs to apply for funding to cover benefit payments and plan expenses through 2051. The PBGC is expected to provide $86 billion in aid to these financially troubled MEPPs. This update summarizes key provisions pertaining to the ARPA's financial assistance program for troubled MEPPs, additional temporary relief for MEPPs, and how these changes may affect employers participating in financially troubled MEPPs.

Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Title IX, Subtitle H, Sec. 9704)

The ARPA established a new special financial assistance fund under the PBGC to provide financial support to select MEPPs on the verge of insolvency. The ARPA allows the following MEPPs to apply for financial assistance under the new PBGC program:

- The MEPP is in critical and declining status for any plan year beginning in 2020 through 2022;
- Benefit cuts or suspensions have been approved pursuant to a separate process run by the U.S. Department of the Treasury as of the date of the ARPA's enactment;
- In any plan year beginning in 2020 through 2022, the plan is certified by the plan's actuary to be in critical status, has a modified funding percentage (current value of assets divided by current value of liabilities) of less than 40%, and has a ratio of active to inactive participants which is less than two to three; or
- MEPPs that became insolvent after December 16, 2014, have remained insolvent, and have not terminated as of the date of the ARPA's enactment.

Guidance on Eligibility and the Application Process

The PBGC is required to issue guidance on how troubled MEPPs can apply for the special financial assistance within 120 days of the ARPA's enactment. Within such guidance, the PBGC is authorized to limit applications for the first two years following the ARPA's enactment to:

- MEPPs that are insolvent or likely to become insolvent within five years of the date of the ARPA's enactment;
- MEPPs where the PBGC projects that the present value of financial assistance payments as otherwise available to the MEPP through existing PBGC programs exceeds $1 billion;
- MEPPs that have implemented benefit suspensions as of the date of the ARPA's enactment; or
- MEPPs that satisfy similar circumstances approved by the PBGC.

MEPPs seeking special financial assistance must submit their application to the PBGC by December 31, 2025, with any revised applications due no later than December 31, 2026. MEPPs facing near-term insolvency will likely apply much sooner than the deadline, but it is not yet clear how the PBGC will budget the $86 billion allocation for later applicants. The PBGC is obligated to respond to the MEPP's application with an approval, rejection, or request for revision within 120 days of submission or the application will be deemed to be approved. On approval, the PBGC is obligated to provide financial assistance in a single lump sum payment.

Amount of Special Financial Assistance Available

The ARPA specifies that there is no cap on the amount of financial assistance that can be granted by the PBGC to the MEPP. The PBGC will provide the amount required for the MEPP to pay all benefits due during the period beginning on the date of the special financial assistance payment and ending on the last day of the MEPP's plan year ending in 2051. Benefits are not reduced for purposes of calculating the special financial assistance amount, except to the extent benefit reductions were previously adopted by the MEPP. However, the ARPA obligates MEPPs receiving special financial assistance to reinstate benefits that were previously suspended and to use a portion of the special financial assistance to make participants and beneficiaries in pay status whole for reductions caused by previous suspensions.

The ARPA restricts an MEPP's use of special financial assistance payments by making these payments available only for payment of benefits and plan expenses, requiring that the payments be segregated from other plan assets, and obligating the MEPP to invest the financial assistance solely in investment-grade bonds or other investments approved by the PBGC. Essentially, the ARPA is making these special financial assistance payments available solely for the purpose of paying benefits and expenses, not to resolve MEPP underfunding either directly or by chasing greater returns through riskier investment strategies.

Additional Conditions for MEPPs Receiving Special Financial Assistance

The ARPA authorizes the PBGC to impose additional, reasonable conditions on MEPPs receiving special financial assistance, such as:

- Limitations on increases in future accrual rates.
- Any retroactive benefit improvements, allocation of plan assets, reductions in employer contribution rates, diversion of contributions to, and allocation of expenses to, other benefit plans.
- Prohibitions on diverting special financial assistance funds to offset withdrawal liability. ARPA initially included a since-removed provision requiring that MEPPs receiving special financial assistance disregard such assistance for withdrawal liability purposes through the 15th anniversary of assistance payment. The PBGC could reinstate this requirement through subsequent rulemaking.

However, the PBGC is not permitted to impose conditions on prospective reductions in plan benefits, plan governance, selection of service providers, or any funding rules relating to MEPPs receiving special financial assistance.

No Requirement to Repay Financial Assistance Received

The ARPA explicitly states that MEPPs receiving financial assistance under the ARPA are not required to repay the PBGC for any amount of the financial assistance payment. However, MEPPs are limited in how they can use financial assistance payments (for benefit payments and plan expenses only) and are subject to certain other requirements, so the PBGC could implement rules obligating MEPPs that fail to adhere to these limitations and requirements to repay some or all of the financial assistance payment.

The ARPA specifies that receipt of a special financial assistance payment does not relieve MEPPs from making payment of PBGC premiums otherwise applicable to underfunded plans. The ARPA mandates that MEPPs receiving special financial assistance payments be deemed to be in critical status until the last plan year ending in 2051. However, MEPPs receiving such payments may not apply for new benefits suspensions.

Other MEPP Relief Established Under the ARPA

ARPA includes several other meaningful forms of relief for MEPPs facing short-term funding swings resulting from the COVID-19 public health emergency:

- **Temporary Delay on Funding Status Designations (Title IX, Subtitle H, Sec. 9701).** MEPP sponsors typically are required to annually certify the plan's funding status as being in endangered (generally, 65% to 79% funded), critical status (generally, less than 65% funded), critical and declining status (generally, less than 65% funded and projected to become insolvent within ten plan years), or none of the above (generally, more than 80% funded). Entry into endangered, critical, or critical and declining status requires plan sponsors to implement certain adjustments to optional benefits and to adopt supplemental benefit contribution requirements for contributing employers (a funding improvement plan for MEPPs in endangered status and a rehabilitation plan for MEPPs in critical or critical-and-declining status).

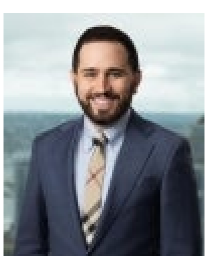
  Under the ARPA, a MEPP can elect that its funding status for the first plan year beginning on or after March 1, 2020, and ending on February 28, 2021, or the next succeeding plan year (in either case, the designated plan year), be the same funding status as reported by the MEPP for the plan year preceding the designated plan year. For example, a MEPP that was in endangered status for the plan year ending on December 31, 2020, can elect to retain its endangered status for either the plan year beginning on January 2021 or on January 2022. This relief allows MEPPs to avoid implementing long term changes (e.g., mandatory adoption of a rehabilitation plan) due to funding changes that may be short term and resulting from the COVID-19 public health emergency.
- **Temporary Extension of Funding Improvement and Rehabilitation Periods for Multiemployer Pension Plans in Critical and Endangered Status for 2020 or 2021 (Title IX, Subtitle H, Sec. 9702).** Under the ARPA, MEPPs in endangered status or critical status that have already implemented a funding improvement plan or rehabilitation plan, respectively, can elect to extend the period to which these supplemental contribution plans apply by five years. This relief will give underfunded MEPPs additional time to collect supplemental contributions that serve to improve the funding status of such plans.
- **Adjustment to Funding Standard Account Rules (Title IX, Subtitle H, Sec. 9703).** As a component of determining a MEPP's funding status (i.e., endangered, critical, critical-and-declining, or green zone), ERISA and the Code require assessment of an MEPP's funding standard account. The funding standard account exists to track an MEPP's income (primarily, employer contributions) relative to the minimum funding requirements of ERISA and the Code. The ARPA allows MEPPs to effectively use pre-COVID funding standard account assessment results by taking into consideration losses related to the COVID-19 public health emergency (e.g., reductions in contributions, reductions in employment, and deviations from anticipated retirement rates). Specifically, MEPPs may smooth investment losses over a period of up to 10 years (as compared to the five-year period that would normally apply) in one or both of the two plan years ending after February 29, 2020, when determining the actuarial value of assets. Further, MEPPs may elect to amortize experience losses attributable to investment and other pandemic-related losses in one or both of the two plan years ending after February 29, 2020, over a period of up to 30 years, as compared to the normal period of 15 years. Plans that elect either form of relief are subject to limitations on benefit increases during the amortization or smoothing period (as applicable) unless such benefits are funded with additional employer contributions. This relief will allow some MEPPs to avoid funding status changes that may be the temporary result of the COVID-19 public health emergency.

Potential Impacts of ARPA Relief for Employers Participating in Financially Troubled MEPPs

The ARPA's relief provisions for MEPPs will primarily benefit the MEPPs themselves and the participants and beneficiaries of the plan. However, these relief provisions will have a significant impact on employers participating in financially troubled MEPPs.

- For employers participating in MEPPs receiving financial assistance payments from the PBGC, it is possible that these MEPPs can significantly improve their funding percentages and avoid insolvency. Though these MEPPs cannot use financial assistance payments for purposes other than benefit payments and plan expenses, this assistance will allow MEPPs to dedicate other funding sources (e.g., supplemental contributions imposed under a funding improvement or rehabilitation plan) to resolving plan underfunding (instead of use for payment of current benefits as is done by many financially troubled MEPPs, which prevents the MEPP's funding percentage from improving). As the MEPP's funding percentage improves, each participating employer's contingent withdrawal liability could decrease. The financial assistance payments provided through the ARPA could allow troubled MEPPs to delay insolvency and avoid automatically triggering withdrawal liability as a result of a mass withdrawal. As noted above, the ARPA does not specify how these special financial assistance payments should be treated for withdrawal liability calculation purposes, but the PBGC may address this issue in formal rulemaking or supplemental guidance (including, potentially, reinstating the requirement to ignore such payments for withdrawal liability purposes for 15 years from receipt).
- The ARPA requires that MEPPs receiving financial assistance payments from the PBGC be deemed to be in critical status through 2051, which means that these MEPPs will continue to implement a rehabilitation plan during this period. MEPPs are permitted to impose supplemental, non-benefit bearing contributions under rehabilitation plans that are used solely for the purpose of resolving MEPP underfunding. Continued participation in an MEPP receiving financial assistance payments therefore will require the participating employer to make these supplemental contributions for several decades. However, the new financial assistance offered under the ARPA to cover benefit payments and plan expenses could make it more likely that these supplemental contributions actually allow MEPPs to escape insolvency and to reduce their underfunding. This similarly could assist employers in reducing their contingent withdrawal liability.
- Under the ARPA's other relief for MEPPs, any MEPPs currently in endangered, critical, or critical and declining status are allowed to rely on pre-COVID-19 funding status designations and to extend existing funding improvement or rehabilitation plans. This relief allows MEPPs to temporarily avoid moving into a worse funding status (e.g., from endangered to critical status), so this could help employers avoid facing more severe supplemental contribution requirements (e.g., on moving from a funding improvement to a rehabilitation plan).

Authors



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