

THE PENSION PROTECTION ACT

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Many public employers with employees covered by multiemployer pension plans have received notices that those pension plans are in “Critical status” or “Endangered status.” The federal Pension Protection Act (“PPA”) imposes certain requirements and restrictions on pension plans deemed to be in Critical status (funded percentage is less than 65%) or Endangered status (funded percentage is 65% or more but less than 80%).

A question that is frequently asked is whether public employers are subject to the PPA. For most public employers, the answer is No. Unfortunately, there is a subset of public employers who are subject to the Act’s requirements with respect to private sector multiemployer pension plans in which they participate. The PPA amended certain provisions of the federal Employee Retirement Income Security Act. Although public employers are generally exempt from ERISA’s requirements, private sector multiemployer pension plans are covered by ERISA. Where public employers participate along with private employers in a multiemployer pension and benefit plan, ERISA’s provisions apply to the plan and all participating employers, regardless of whether they are public sector or private sector employers. If a governmental employer voluntarily participates in “a private welfare benefit plan for its employees it cannot later complain that ERISA regulation of that plan invades its sovereignty.” Livolsi v. City of New Castle, 501 F. Supp. 1146, 1150 (W.D. Pa. 1980) (ERISA requirements applied to a city and public authority that decided to participate in a multiemployer private sector benefits plan). Most frequently, these plans will be a union sponsored multi-employer plan which the municipality joined through its collective bargaining agreement.

Another common question regarding the PPA relates to what steps an employer needs to take upon receiving a notice indicating the plan is in Critical status or Endangered status. The answer to that question invariably is “pay more.” The PPA requires the trustees of plans deemed to be in Critical or Endangered status to issue a “Rehabilitation Plan” designed to improve the financial condition of the plan, with schedules showing the amounts the Rehabilitation Plan will require employers to contribute in an effort to stabilize the plan. For plans in Critical status, plan trustees immediately impose surcharges on participating employers until they adopt one of the schedules issued as part of the Rehabilitation Plan, beginning at 5% of the current contribution rate in the first year of Critical status and increasing to 10% in the second year.

Rehabilitation plans typically involve a choice between a Preferred Schedule or a Default Schedule of increased contributions. Since pensions are a mandatory subject of bargaining, the choice of a schedule must be bargained with the union. The employer may do so midterm or may wait until the current collective bargaining agreement is up to elect a schedule. The Rehabilitation Plan may also impose certain reductions in early retirement benefits and future “adjustable benefits” (such as disability pensions not already being paid or death benefits). If the Preferred Rehabilitation Plan schedule is not adopted, a Default schedule will be imposed 180 days after the first CBA expiration date after the Rehabilitation Plan has been adopted by the trustees. Under a Default schedule, participants receive fewer benefits than they would under the Preferred schedule and the employer sometimes, but not always, pays more. Due to the reduced benefits under the Default schedule, unions typically advocate for the Preferred schedule to be adopted.

While a plan is in Critical or Endangered status, the Pension Protection Act takes some common approaches to curbing pension costs off the bargaining table. Benefits may not be cut or eliminated for new hires. If a pension plan is in either Critical status or Endangered status, then the plan trustees may not accept a collective bargaining agreement or participation agreement that provides for 1) “a reduction in the level of contributions for any participants”, 2) “a suspension of contributions with respect to any period of service”, or 3) “any new direct or indirect exclusion of younger or newly hired employees from plan participation.” 29 U.S.C.A. §§ 1085(d), 1085(f)(4).

Multiemployer pension plans continue to struggle, as a diminishing number of participating employers are left to carry the burden as other employers withdraw from the plan or go out of business. Getting out of the multiemployer pension plan may be the best option long-term, but it can be a costly proposition. Although the Pension Benefit Protection Act placed numerous restrictions on plans, it does not prohibit employers from withdrawing from multi-employer pension plans, so long as they meet their withdrawal liability obligations. Given the setbacks most plans have seen in recent years, withdrawal liability is usually substantial, but it can be paid in annual installments rather than in a lump sum. In addition to seeking union concessions to balance the increased contributions required by the PPA, employers in multiemployer pension plans should consider bargaining for the right to withdraw from the plan if they do not have that ability already.