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Multiemployer Plans

ERISA Anti-Cutback Rule at Heart of Debate On NCCMP Proposal for Multiemployer Plans

There is one thing representatives for multiemployer pension plans can agree on: The system needs to be strengthened if it is going to survive.

But there is some disagreement about how to get there, and one aspect of the National Coordinating Committee for Multiemployer Plans' proposal—revising the anti-cutback rule under the Employee Retirement Income Security Act so that plan trustees can reduce participants' benefits—is at the heart of the disagreement.

''There are parts of the NCCMP proposal that have merit,'' Karen Friedman, executive vice president and policy director at the Pension Rights Center, told Bloomberg BNA on May 7.

''What we find completely objectionable is the proposal to cut already earned benefits of retirees as a way of addressing a potential problem that may not occur for another 10 to 20 years.'' Reducing earned benefits ''is a terrible precedent, and it's going to lead to a society where nobody can depend on anything. It fundamentally torpedoes ERISA's basic protections,'' Friedman said.

A host of pressures are making an overhaul urgent, said Randy DeFrehn, NCCMP executive director, at a conference May 6 held by the International Foundation of Employee Benefit Plans. This includes general pressures to abandon defined benefit plans to reduce costs, new employer concerns over withdrawal liability and the expiration at the end of this year of the multiemployer plan provisions under the Pension Protection Act of 2006, DeFrehn said.

The NCCMP, a coalition of 42 groups across the multiemployer community, met for about a year and half to arrive at a consensus on a course of action to strengthen multiemployer plans, DeFrehn said.

The result of their effort was a proposal issued in February 2013 titled ''Solutions Not Bailouts,'' which is divided into three broad categories of proposals, including preservation of multiemployer plans, remediation of plans headed for insolvency and innovation to encourage new plan designs, DeFrehn said.

The remediation element has attracted the most criticism. That element would allow trustees of ''deeply troubled'' plans to reduce retirement benefits—that is, to use cutbacks—before plan insolvency, but only after meeting certain criteria.

The NCCMP's proposal has received bipartisan support from the House and Senate committees of jurisdiction, and legislation is currently being drafted that may incorporate some of the NCCMP's suggestions, DeFrehn said.

Time for Changes. As ERISA approaches its 40th anniversary, ''it's time to recognize that it's been recapped several times, it's got a lot of patches on it, and there are still some problems with it,'' DeFrehn said at the IFEBP conference.

Removing the restrictions of current ERISA standards would allow workers in multiemployer plans to continue to receive retirement benefits, he said.

The anti-cutback rule under tax code Section 411(d)(6) provides that a plan can't be amended to retroactively eliminate or reduce a pension benefit that has already accrued by the date of the adoption of the amendment.

The anti-cutback rule also prevents an employer from amending a qualified plan to retroactively eliminate optional benefit forms or to eliminate or reduce early retirement benefits or a retirement-type subsidy. Changes may be made on a prospective basis with respect to benefits that have not yet been accrued as of the amendment's adoption date.

David Certner, legislative counsel for AARP told Bloomberg BNA in an e-mail that the senior citizens group's chief concern with the NCCMP proposal is that it would permit the reduction of accrued retirement benefits, which directly contradicts the ''fundamental'' anti-cutback rule under ERISA.

Which Plans? Only plans that are in danger of becoming insolvent—also called critical status or red zone plans—and which, after making necessary adjustments, will remain solvent, would be eligible for relief under the NCCMP's proposal, DeFrehn said.

The exact number of affected plans is unknown, but based on reports from actuaries with which his commission has worked, and estimates from the Pension Benefit Guaranty Corporation, about 90 to 200 plans could access the relief if the measures are enacted, he said.

The Pension Protection Act of 2006 created a temporary set of rules, effective for plan years beginning in 2008 and ending in 2014, addressing the funding of multiemployer plans that are in endangered or critical status. The status of funds is also referred to as different zones. Plans that are more than 80 percent funded are in the green zone, endangered or seriously endangered plans are in the yellow zone, and plans in critical status are in the red zone.

The anti-cutback rule isn't absolute, because ERISA already allows for benefit reductions to levels set by the

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PBGC, albeit only in the event of a bankruptcy or plan insolvency, DeFrehn said.

Supporting the PBGC. Amending the anti-cutback rule could also help prop up the PBGC, DeFrehn said.

Currently, the PBGC has estimated that absent changes its multiemployer pension insurance fund is headed for insolvency, an estimation that has also been backed up by the Congressional Budget Office and the Government Accountability Office, DeFrehn said.

The PBGC said in its annual report, released Nov. 15, that for fiscal year 2013, it had a record-high deficit of $35.6 billion (222 PBD, 11/18/13; 40 BPR 2654, 11/19/13).

The agency said its deficit for single-employer plans decreased to $27.4 billion, from $29.1 billion in 2012, while the deficit for multiemployer plans increased to a record $8.3 billion, from $5.2 billion at the end of fiscal 2012.

110 Percent. Under the NCCMP's proposal, trustees of red zone plans would be granted the discretion to drop benefits as low as 110 percent of the PBGC's maximum guaranteed benefit level in order to retain plan solvency.

The PBGC's formula for determining a worker's previous maximum annual guarantee is a participant's years of service multiplied by 100 percent of the first $11 of the monthly previous benefit accrual rate and 75 percent of the next $33.

DeFrehn said that some critics have said that all affected plans would drop benefit levels to 110 percent of the PBGC's guarantee.

''That's not true. It's the level of how far down can you go before you reach solvency. You cannot go below 110 percent.''

The 110 percent figure was chosen because there are many plans with benefit levels that are ''just above'' the PBGC's guarantee level, so the proposal would allow more plans to be able to use the relief provisions, DeFrehn said.

The problem with giving trustees the ability to cut retirees' pension benefits is that, ''when you give them the discretion to do so, in many cases they're going to have to use it. It's just the wrong approach,'' Friedman said.

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Text of the NCCMP proposal is at http://www.nccmp.org/forEmails/SolutionsNotBailouts.pdf.

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