

Client Alert

Economic Crisis Response Group

DECEMBER 2008

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The Worker, Retiree, and Employer Recovery Act of 2008 Provides Pension Funding Relief

Introduction

On December 23, 2008, President Bush signed into law *The Worker, Retiree, and Employer Recovery Act of 2008* (“*WRERA*”) (H.R. 7327). WRERA provides temporary relief to pension plans in the midst of one of the most severe financial crises the United States economy has ever faced. The law also suspends for 2009 the obligation of retirees to take minimum distributions from their retirement savings accounts at a time when the plan’s asset values are severely depressed. Further, WRERA provides various technical corrections to the Pension Protection Act of 2006 (“PPA”).

Relief Provisions for Single Employer Pension Plans

Single Employer Plan Funding Targets — WRERA permits single employer pension plans that fall below their funding target for a year (92 percent for 2008 and 94 percent for 2009) to fund up to the specified funding percentage required for that year. Under current law, if a plan does not meet its transitional funding target for the year, the plan is required to become 100% funded (and thus lose the benefit of the transition rule.) This new law will provide relief for employers that, due to the current economic conditions, are unable to meet their required annual funding target.

Freezing Benefit Accruals — WRERA permits plans to “look back” to the plan’s funding status from the previous year to avoid restrictions on benefit accruals under plans that are less than 60 percent funded. Under the current law, for plan years beginning after December 31, 2007, a single employer plan whose adjusted funding target attainment percentage is less than 60 percent funded for a plan year is required to freeze all benefit accruals for its participants. (This future benefit accrual limitation applies only for purposes of the accrual of benefits; service during the freeze period is counted for other purposes, such as vesting.) The provision is effective for the first plan year beginning during the period beginning on October 1, 2008, and before October 1, 2009. Thus, in a 2009 calendar year plan, the look-back is the beginning of 2008.

Minimum Required Distributions — WRERA provides relief for participants who are required to receive a MRD under their tax qualified plans or individual retirement accounts. Under current law, participants age 70 ½ years or older are required to take a minimum distribution from their retirement plans. A participant who fails to take the MRD is subject to a 50% excise tax penalty on the amount that should have been received. Under WRERA, the MRD for 2009 is waived, thereby avoiding the adverse tax consequences of a down market. The MRD remedies do not apply for 2008.

Relief Provisions for Multiemployer Pension Plans

Freezing of Zone Status — Sponsors of multiemployer pension plans can elect to freeze their plan's zone status for the 2009 plan year at the level determined for 2008. Under the PPA plans that are in "endangered" status ("yellow zone") or in "critical" status ("red zone") are subject to additional funding rules, including adopting a funding improvement plan or a rehabilitation plan that could require reductions in benefits and/or additional employer contributions. Under WRERA, a plan certified as endangered or critical for 2008 that elects to freeze its 2008 zone status will not be required to update its funding improvement plan or rehabilitation plan, nor will it have to update its contribution and benefit schedules for 2009. If a plan elects the freeze, but its plan year began in the last quarter of 2008, its level will be frozen at the level it was assigned for the 2007 plan year. However, the plan's actuary will still be obligated to certify the plan's actual status for 2009. If the plan would be endangered for 2009 but for the freeze, the plan's contributing employers will not have to pay any excise taxes, nor will they have to pay any penalties for a minimum funding deficiency.

Plan sponsors that elect to freeze their plans' zone status, must notify plan participants, contributing employers and other stakeholders. The notification must be sent at the time that the 2009 zone status notification is due, but it will replace the latter notice. An election to freeze the plan's zone status under WRERA may be revoked only with the consent of the Secretary of the Treasury, and special notice provisions apply with respect to the election and the notification of participants, the bargaining parties, the PBGC, and the Secretary of Labor.

Extension of the FIP and RP Periods — WRERA also provides a longer correction period for multiemployer plans that are in endangered status or critical status. For either the 2008 or 2009 plan year, endangered or critical plans can elect a 13-year funding improvement period or rehabilitation period, as the case may be (as opposed to the 10-year period provided for in the PPA). A seriously endangered plan can elect an 18-year funding improvement period instead of the 15-year period provided for under PPA.

Implementation of the Default Schedule — WRERA removes the PPA provision that provides that the default schedule under a plan in critical status is implemented on the date on which the U.S. Department of Labor certifies that the bargaining parties are at impasse.

A default schedule applies if a funding improvement plan or rehabilitation plan is not timely adopted by the collective bargaining parties. Thus, under WRERA, the plan sponsor must now implement the default schedule within 180 days of the expiration date of the collective bargaining agreement. In addition, WRERA clarifies that any failure to make a default schedule contribution is enforceable under Section 515 of ERISA.

Technical Corrections to the PPA

In addition to funding relief, WRERA also provides various technical corrections to PPA, including:

- Payment restrictions on accelerated forms of payment under critical multiemployer plans such as lump sum payments apply only to participants whose benefit commencement date is after the date that notice of the plan's critical status is provided.
- Both the actuarial value and the market value of the plan's assets must be reported as of the valuation date for the plan year reported on, in addition to the two preceding plan years.
- Section 4221(e) of ERISA, the provision that permits a plan to charge the reasonable cost for making an estimate of an employer's potential withdrawal liability or providing information unique to an employer, is repealed.
- Clarification that the averaging method under PPA is to be adjusted for expected earnings. Under PPA, assets can be valued by using either market value or an averaged market value.
- Clarification that the 3-year vesting rule for cash balance, or hybrid, plans under the PPA applies only to participants who have at least one hour of service after the effective date of the PPA provisions (*i.e.*, for the plan year beginning after December 31, 2007).
- Qualified plans will be obligated to permit non-spouse beneficiaries to rollover distributions effective for plan years beginning after December 31, 2009 (before WRERA, the IRS interpreted PPA as making this provision optional).
- Plan expenses expected to be paid from plan assets must be included in the calculation of the plan's target normal cost.
- Rollovers from a Roth 401(k) or 403(b) plan to a Roth IRA are not subject to the Roth IRA contribution adjusted gross income ("AGI") limits.
- Lump sums of \$5,000 or less can be paid, even if a plan is underfunded and is prohibited from otherwise making such lump sum payments.

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Special thanks to **Melissa Jacoby** and **Anthony Cacace** for their assistance in creating this alert.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

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