LEGAL UPDATE

Important Benefit Plan Provisions of the American Rescue Plan Act of 2021

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Although not the primary focus of the American Rescue Plan Act of 2021 ("ARPA") and, at least with respect to the multiemployer relief measure, having little direct relationship with the pandemic, there are some benefit plan provisions that will affect plan sponsors and contributing employers.

I. Dependent Care Assistance

Solely for the plan year beginning in 2021 and with regard to the Internal Revenue Code ("Code") §125 plans that offer dependent care flexible spending accounts for employees, the $5,000 annual limit for married employees filing jointly has increased to $10,500, and the $2,500 annual limit for married employees filing separately or single employees has increased to $5,250. An amendment to your Code §125 plan to implement this change in the annual limit would need to be executed no later than the last day of the 2021 plan year. This change coupled with the midyear election change relief discussed in IRS Guidance on Flexible Spending Account Relief Under CAA, may allow for midyear election changes to increase amounts deferred to dependent care flexible spending accounts in 2021. *See https://www.wagnerlawgroup.com/resources/health-welfare/irs-guidance-on-flexible-spending-account-relief-under-caa.*

II. 100 Percent COBRA Subsidy

A 100 percent subsidy for COBRA premiums is provided for a maximum six-month period beginning April 1 and ending September 30. This subsidy is similar in many respects to the COBRA subsidy enacted in 2009 under the Obama administration except that the subsidy is greater and the administrative complexity is increased by the need to coordinate this subsidy with the extended deadlines for taking actions with respect to COBRA elections and COBRA payments as discussed in Surprise DOL Guidance on Conclusion of One-Year ERISA Compliance Relief Period. *See https://www.wagnerlawgroup.com/resources/health-welfare/surprise-dol-guidance-on-conclusion-of-one-year-erisa-compliance-relief-period.*

The subsidy is not included in the gross income of the individual receiving the subsidy. Individuals eligible for the subsidy are any individuals who became or become eligible for COBRA continuation coverage as a result of termination of employment or a reduction in hours, except for voluntary terminations and terminations due to gross misconduct. There is no requirement that the termination of employment or reduction in hours have any connection with the pandemic, and the manner in which the law is drafted suggests that the relief could be available to former employees who became eligible to elect COBRA prior to the pandemic and either failed to make an election or made an election and subsequently discontinued coverage.

The period of assistance extends until the end of the coverage period (generally 18 months), the individual obtains coverage under another group health plan (with limited exceptions) or the individual becomes eligible for Medicare. The eligible individual must notify the group health plan if he or she

becomes eligible for Medicare or becomes covered under another group health plan (with limited exceptions). The subsidized coverage is prospective, and cannot begin before April 1, 2021. It appears that a COBRA beneficiary whose qualifying event was earlier than April 1, 2021 may be able to just elect COBRA starting from that date, and skip the period prior to that date for which the beneficiary is eligible.

Further, not only will the individual be eligible for COBRA continuation coverage, he or she will have the opportunity to elect a less expensive option, so long as it is being offered to similarly situated individuals. Plan sponsors will notify eligible employees of this option, and employees will have a 90-day period within which to decide if they want the less expensive coverage. The plan administrator is required to notify assistance-eligible individuals within 60 days of April 1 of the extended election period and the availability of lower cost coverage, and within 30 days of enactment, the DOL, IRS and HHS are to provide a model notice. The Plan administrator is also required to provide notice of the expiration of coverage, and the three agencies are required to issue a model notice with respect to the expiration of coverage within 45 days of the date of enactment. The Act also includes provisions dealing with agency regulations and outreach. Plan sponsors paying subsidies will receive a refundable tax credit each quarter in the amount of the premiums they would have received if not for the COBRA subsidy.

III. Single Employer Defined Benefit Plans

The present seven-year period for amortizing defined benefit plan shortfalls would be extended to 15 years for plan years beginning in 2022, although a plan sponsor could implement the extended period in 2019, 2020 or 2021, resulting in a modified extended period. The favorable interest rate corridors that were scheduled to be phased out beginning in 2021 have been extended and expanded, and there is an interest rate floor of 5 percent on the 25-year average that is used to stabilize interest rates. These changes are beneficial to plan sponsors, because the higher the interest rate, the lower the plan's liability. The effect of these changes is to reduce contributions, which increases tax revenue to pay for the multiemployer pension plan reform discussed below. However, the Senate version of the bill eliminated one of the ways in which the multiemployer pension plan relief would have been paid for, the freezing of certain annual cost of living adjustments to tax-qualified plan benefits.

IV. Multiemployer Pension Plan Reform

Because the multiemployer pension plan relief provisions were part of budget reconciliation, which allowed the Act to pass the Senate by a simple majority, certain provisions were not included. These provisions could be included in subsequent pension plan legislation, such as the so-called SECURE Act 2.0, which generally has widespread bipartisan support, although further legislation would require 60 votes for Senate approval.

There are two distinct elements to the multiemployer pension plan relief. One component, temporary relief for plans that have been adversely affected by the pandemic, is similar to pension relief provided in response to the 2008 financial crisis. These changes include:

- a one-time freeze of zone status as defined under the Pension Protection Act of 2006;
- a five-year extension of funding improvement or rehabilitation periods;
- a longer period for amortization of losses resulting from the pandemic;
- an extension of the asset-smoothing period; and
- a widened corridor for determining the actuarial value of plan assets.

The last three of these relief provisions, however, are not available if the plan is also receiving special financial assistance as described below, and the provisions are also subject to a solvency test and restrictions on improving benefits.

The second component attempts to address a long-standing problem, the severely underfunded status of several multiemployer pension plans that face insolvency in the near term, which would result in the insolvency of the PBGC multiemployer insurance fund. Rather than relying upon multiemployer premiums to guarantee benefits under these plans, the Act establishes a new fund with the PBGC, which can receive funds from the Treasury until September 30, 2030. Payments provided to multiemployer plans from the new fund are not loans: the plans will have no repayment obligation.

To be eligible for this special financial assistance, a multiemployer plan must satisfy one of four conditions:

- the plan must be in critical and declining status for any plan year beginning in 2020 through 2022;
- a suspension of benefits must have been approved for the plan as of the date of enactment;
- in any plan year beginning in 2020 through 2022, the plan must be certified by the actuary to be in critical status, have a modified funding percentage of less than 40 percent, and have a ratio of active to inactive participants that is less than 2:3; or
- the plan must have become insolvent after December 31, 2014, and have remained insolvent, and not have been terminated, as of the date of enactment.

Within 120 days after enactment, the PBGC is required to issue regulations or guidance setting forth the requirements for special financial assistance applications. The PBGC was also given the authority for a period of two years (beginning

on the date of enactment) to give priority consideration to plans that:

- are insolvent or likely to become insolvent within five years of enactment;
- the PBGC projects to have a present value of financial assistance that exceeds $1 billion in the absence of special financial assistance;
- have implemented benefit suspensions as of the date of enactment; and
- the PBGC determines to be appropriate based on other similar circumstances.

If the PBGC exercises its authority to issue guidance, it must do so in consultation with the Secretary of the Treasury.

An application for special financial assistance must be submitted by December 31, 2025, and any revised application must be submitted no later than December 31, 2026. An application is deemed approved by the PBGC unless the PBGC responds within 120 days. If an application is not approved, the plan can resubmit the application which will be deemed approved unless the PBGC notifies the plan of an issue with the application. The financial assistance will be effective not later than one year after the application is approved, but no financial assistance will be paid after September 30, 2030. The Act directs financial assistance to be paid in a lump sum as soon as practicable after approval by the PBGC, without regard to the PBGC cap on guaranteed benefits.

The amount of the special financial assistance benefit is the amount required for the plan to pay all benefits during the period beginning on the date of payment and ending on the last day of the plan year ending in 2051, with no reduction in accrued benefits (except for adjusted benefits and taking into account reinstatement of suspended benefits). The Act prescribes actuarial methods and assumptions for making that determination.

Plans may invest the special financial assistance only in investment-grade bonds or other investments permitted by the PBGC, a radical departure from traditional ERISA and qualified-plan guidance, which has not regulated plan investments.

Addressing moral hazard concerns, the PBGC is permitted to impose reasonable conditions on plans receiving special financial assistance relating to increases in future accrual rates and retroactive benefit improvements; allocation of plan assets; reductions in employer contribution rates; diversion of contributions and allocation of expenses to other benefit plans; and withdrawal liability. However, the PBGC may not impose conditions relating to a prospective reduction (or adjustment) of plan benefits; plan governance, including selection and removal of and terms of contracts with trustees, actuaries, investment managers and other service providers; and funding rules. Additionally, an eligible multiemployer plan may not apply for a new suspension of benefits.

PBGC premiums will continue to apply, and the plan will be in critical status through the 2051 plan year. Any special financial assistance received by the plan will not be considered in determining the amount of its required contributions under the Code. PBGC premium rates will be increased to $52 per participant beginning with the 2031 plan year and will be adjusted annually thereafter based on the Social Security national average wage index. The PBGC rate for 2021 is $31 per participant.

V. Code Section 162(m)

For tax years beginning after December 31, 2026, the definition of a covered employee for purposes of Code §162(m) is expanded to include the five most highly compensated employees. Unlike the rule applicable to other covered employees under Code §162(m), this group will be redetermined each year.

Clearly, ARPA has important employee benefit plan implications beyond providing pandemic relief for working families. For help navigating Code §125 plan temporary changes and amendments, implementing and communicating the 2021 COBRA subsidy for employees, taking advantage of the single employer pension plan interest rate changes, complying with the Code §162(m) change, or for more information on multiemployer plan relief, please contact The Wagner Law Group.

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