THE WAGNER LAW GROUP

LAW ALERT
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Presidential Memorandum Stirs Long-Simmering Pension Issues

Employee benefits law often involves interaction between Congress, the Executive Branch, and the courts. That calls for an understanding of the politics of law reform and regulation. A recent presidential document illustrates the point.

On October 22, 2020, President Trump issued a memorandum to the Secretaries of Treasury, Labor, and Commerce, directing them to review the Pension Benefit Guaranty Corporation's ("PBGC") termination of the Delphi Salaried Pension Plan and application of PBGC benefit guarantee limits and to inform the President within 90 days

> *of any appropriate action that may be taken, consistent with applicable law, to (i) address affected Delphi retirees' lost pension benefits, and (ii) bring additional transparency to the decision to terminate the plan . . . [to] include an evaluation of the feasibility of enacting legislation and whether the plan may be restored to its pretermination status…*

The memorandum also calls for these Cabinet members to review the pension plans presently held in trusteeship by the PBGC and inform the President within 180 days

> *of any appropriate action that may be taken consistent with applicable law. Actions may include proposing legislation that appropriately balances the interests of all those covered by the pension system — from retirees, workers, employers, and unions, to plans and taxpayers — to address the insolvency of such plans and to maintain the future solvency of the PBGC's Single-Employer and Multi-Employer Programs.*

The memorandum also states that the Delphi salaried retirees'

> *unionized colleagues were able to keep their full pensions through a deal with General Motors. The previous Administration failed to fully protect the pensions of Delphi's salaried and non-unionized workforce, despite that Administration's substantial influence over General Motors' bankruptcy proceedings.*

The Secretaries of Labor, Treasury, and Commerce make up the PBGC's Board of Directors. PBGC's operations are headed by a Presidentially appointed Director.

The Political Reaction: Cheers and Jeers

The memorandum is well timed for Election Day. Delphi's operations were concentrated in the Midwest. The greatest threat to the multiemployer system is the expected failure of the Central States Pension Fund, also largely concentrated in the Midwest.

Senator Rob Portman (R.-Ohio) issued a statement in support of the Delphi salaried retirees. Congressman Bobby Scott (D.-Va.), who chairs the House Committee on Education and Labor, pointed out that the House has already passed a multiemployer rescue bill.

That bill (the "Rehabilitation for Multiemployer Pensions" or "Butch Lewis" bill) would provide long-term government-backed loans to pay benefits at plan levels. The Senate majority's proposal (the "Multiemployer Pension Recapitalization and Reform Plan") would include early intervention, funding reforms, and enhanced oversight, to ensure that another rescue doesn't become necessary.

The Need for Multiemployer Reform: With or Without Guardrails

Even mainstream groups like the National Chamber of Commerce agree that multiemployer reform legislation is overdue.

As we wrote here in April 2019:

> *Among the reforms that have been suggested are stakeholder premiums, changes to funding, withdrawal liability, and benefit adjustment rules, stronger governance rules, and clearer rules on plan termination and windup. Spreading the pain across various constituencies could justify a rescue of multiemployer plans, without setting the precedent of a taxpayer "bailout."*

Multiemployer reform would affect about ten million plan participants. Their spending in retirement would have a "multiplier effect," creating more spending and supporting jobs. Reform therefore seems inevitable, but when and on what terms remains highly uncertain.

Special Legislation: A Slippery Slope?

While multiemployer reform would have broad implications, the President's Delphi proposal is a "rifle shot." GM spun off Delphi, its parts division, in 1999. The United Auto Workers negotiated re-employment and pension guarantees with GM in case Delphi faltered. Salaried employees had no such leverage.

Delphi filed for bankruptcy in 2006. Delphi hoped to stay in business and continue its pension plans. But the recession of 2008 threatened the auto industry, its supply chain, and millions of jobs. A federal Auto Task Force directed Troubled Asset Relief Program ("TARP") moneys to Chrysler and GM to facilitate bankruptcy sales to new owners. That allowed GM to make up nonguaranteed benefit losses under the Delphi Hourly Pension Plan for unionized workers when PBGC took it over. There was no such assistance for the salaried employees.

In taking over the Delphi Salaried Pension Plan, the PBGC incurred about $2 billion in insurance losses. Retirees lost another $500 million in non-guaranteed benefits. An association of former salaried employees sued to undo the takeover. The litigation continued until March 2019, when the district court upheld the takeover. The Sixth Circuit affirmed in September 2020.

In the meantime, the association lobbied Congress and the Executive Branch. Audits by the Government Accountability Office and the Special Inspector General for the TARP followed. They dealt with the allegation that the Task Force "picked winners and losers" -- unionized workers over salaried employees -- but made no substantive recommendations.

Special relief legislation can be a slippery slope. For instance, in 2006, Congress gave funding relief to the few airlines that still had defined benefit pension plans. Congress gave funding relief to certain Cooperatives and Small Employer Charities ("CSECs") in 2014, and to certain Community Newspapers in 2018. The ERISA agencies do not engage in legislative advocacy but can be expected to voice such concerns within the Administration.

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As the Presidential memorandum illustrates, reasonable minds can differ over employee benefits law reform, even when they agree that reform is necessary. And even a fully litigated case may not be over.

The Wagner Law Group's Legislative, Regulatory & Policy Services practice group is well equipped to advise on such matters, to navigate the complexities of government relations, and to advocate before Congress, the ERISA agencies, and the courts. If you have questions, please do not hesitate to contact a member of that group.

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