



TOPIC: **The Pension Protection Act of 2006**

**EXECUTIVE SUMMARY:** MULTIEMPLOYER PLAN PARTICIPANTS AND SPONSORS HAVE REASON TO CELEBRATE THE ENACTMENT ACTION LAST MONTH, OF THE PENSION PROTECTION ACT OF 2006 (“PPA”), THE MOST EXTENSIVE PENSION LEGISLATION SINCE THE PASSAGE OF ERISA IN 1974. WHILE ITS PROVISIONS INCLUDE TOUGH NEW FUNDING STANDARDS, IT ALSO INCLUDES NEW TOOLS TO PROTECT PLAN PARTICIPANTS, CONTRIBUTING EMPLOYERS AND THE PLANS THEMSELVES, ENSURING THEIR LONG TERM FINANCIAL VIABILITY.

THIS ACTION CAPPED THE NCCMP’S FOUR-YEAR, LEGISLATIVE STRUGGLE TO OBTAIN REAL PENSION FUNDING REFORM FOR MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS. BUILDING ON THE COALITION FORMED IN THE FIGHT FOR MULTIEMPLOYER RELIEF IN THE PENSION FUNDING EQUITY ACT OF 2004, THE NCCMP FACILITATED THE CREATION OF, PROVIDED FUNDING FOR, AND COORDINATED THE EFFORTS OF, THE MULTIEMPLOYER PENSION PLAN COALITION, A BROAD BASED GROUP OF OVER 50 LABOR UNIONS, EMPLOYER ASSOCIATIONS, LARGE EMPLOYERS AND TRADE ASSOCIATIONS WITH AN INTEREST IN MULTIEMPLOYER FUNDS THAT CAME TOGETHER FOR THE SPECIFIC PURPOSE OF OBTAINING COMPREHENSIVE FUNDING REFORM FOR MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS. THROUGH MANY MONTHS OF EXTENSIVE NEGOTIATIONS, THE COALITION CAREFULLY CRAFTED A COMPREHENSIVE COMPROMISE PROPOSAL DESIGNED TO STRENGTHEN THE FUNDING OF ALL PLANS, IMPOSE ADDITIONAL DISCIPLINE ON PLANS BEGINNING TO EXPERIENCE A DECLINE IN FUNDING LEVELS, AND, FOR THE MOST SERIOUSLY UNDERFUNDED PLANS, TO PREVENT FUNDING DEFICIENCIES THAT THREATENED TO PLUNGE CONTRIBUTING EMPLOYERS INTO BANKRUPTCY, POTENTIALLY RESULTING IN PLAN FAILURES AND FOR MOST PLANS, THE DRASTIC REDUCTION OF BENEFITS PAYABLE TO ALL PARTICIPANTS IF THE PBGC GUARANTY PROGRAM WERE TO ASSUME THE PLANS’ LIABILITIES.

AT THE SAME TIME, NCCMP AND THE COALITION ACTED TO PROTECT MULTIEMPLOYER PLANS FROM THE NEW, SIGNIFICANTLY MORE RESTRICTIVE SINGLE-EMPLOYER PLAN RULES.

THIS ISSUE OF **MULTI-ELERT** WILL SUMMARIZE THE NEW LAW, PROVIDE A SIDE-BY-SIDE COMPARISON WITH PREVIOUS LAW, AND EXAMINE ITS IMPLICATIONS FOR MULTIEMPLOYER PLANS AND THEIR CONTRIBUTING EMPLOYERS.

PURPOSE: INFORMATIONAL

CATEGORY: LEGISLATIVE

TARGET AUDIENCE: TRUSTEES AND PLAN ADVISORS OF DEFINED BENEFIT AND DEFINED CONTRIBUTION PENSION AND HEALTH BENEFIT PLANS

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REFERENCE: **VOL.6, ISSUE 5**

MORE INFORMATION: SEE: **MULTI-ELERT VOL. 3 ISSUE 1 AND VOLUME 4, ISSUE 1; JOINT COMMITTEE ON TAXATION TECHNICAL EXPLANATION OF H.R. 4; SIDE-BY-SIDE COMPARISON**

# *THE PENSION PROTECTION ACT OF 2006: STRONG, BUT EFFECTIVE MEDICINE FOR MULTIEMPLOYER PLANS*

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**T**he Pension Protection Act of 2006 has been criticized by many as a vehicle designed to hasten the demise of defined benefit pension plans. Unfortunately, such a broad generalization fails to recognize the distinctions between single employer and multiemployer plans and the implications for each. In fact, the distinctions are clear, numerous and, contrary to the implications for single employer plans, the long-term prospects for multiemployer plans have been enhanced by the passage of this bill.

To provide a context to view the multiemployer provisions, a comparison table of some of the most significant differences between single and multiemployer plans of the PPA is provided below. In addition a bullet point summary of the key multiemployer elements of the bill of the law is also included. Finally, for those with more than a passing interest in seeing more details, a side-by-side of the new law with corresponding provisions of previous law (where applicable) is also included as an attachment. Supplemental documents are also attached to the electronic version of this issue of *Multi-Elert*, including (for background) two previous issues that addressed earlier attempts at achieving pension reform, as well as a more exhaustive technical explanation of H. R. 4 that was prepared by the staff of the Joint Committee on Taxation.

## **Single vs. Multi-: How did we fare?**

The following chart shows some of the more significant aspects of the PPA for both single employer and multiemployer plans. Although the press accounts have often focused on the PPA's goal of forcing employers to live up to funding promises made to employees, a careful review of the law's provisions exposes the more fundamental objective of limiting the PBGC's exposure to additional liabilities, advancing the current Administration's view that the agency is little more than an insurance program whose risks should be eliminated, rather than a safety net for plan participants. Of particular note are the aspects of the new single employer rules that deal with amortization schedules (seven-year amortization for all costs), two-year smoothing, restrictions on the use of accumulated credit balances in the plan's funding standard account, elimination of future accruals for under funded plans; and the use of a segmented yield curve for determining interest rates to be used in calculating a plan's liabilities. For single employer plans, these changes are expected to inject considerable volatility in determining a plan sponsor's contribution rates that will, in fact, discourage many employers from continuing their defined benefit plans. The fact that these aspects of plan funding have remained relatively unchanged for multiemployer plans represents a significant achievement for our plans.

<b>Provision</b>	<b>Multiemployer Plan Rules</b>	<b>Single Employer Rules</b>
Faster Funding	15 year amortization for benefit increases and changes in actuarial assumptions	7 year amortization for accrued benefits
Use of Credit Balances	No Change	Greatly restricted
Smoothing	No Change	Assets, interest rates, “smoothed” over 2 years
Interest rates, mortality tables	No Change	Interest – 3 segment modified “Yield Curve” Mortality- Uniform updated tables for under funded plans
Faster IRS Relief	Yes	No Change
Higher Deduction Limits	140% of Current Liability Elimination of DB/DC aggregation rule for multiemployer plans regarding the 25% of compensation limit	150% of Funding Target (gradually phased in to 100%)
Under funded plans (generally)	“Yellow Zone” rules	If less than 80% funded, no benefit increases
Seriously under funded plans	“Red Zone” rules	At risk plans – No benefit accruals, tougher funding requirements
Disclosure	More	More

**This Law is over 900 pages long and is nearly incomprehensible for the non-lawyer trustee. What is the bottom line for my fund?**

The primary objective of this reform effort – protecting the plans and, by extension, the participants of plans that are at greatest risk of experiencing a funding deficiency- was achieved, even though the path to recovery for many will be difficult. The process itself, like the plans it was intended to preserve, demonstrated the best of what can be done when labor and management work collaboratively to achieve a common goal. What the Act means for any specific plan, however, depends on its current funded position and its long term economic prospects.

The most important aspects of the PPA are presented in the following summary: **“Highlights of the Multiemployer Provisions of the Pension Protection Act of 2006.”** The changes to “business as usual” operations of multiemployer plans are enormous. The law sets out an entirely new funding scheme and directs the federal agencies with jurisdiction over pension plans to draft regulations that will involve interpretation of the statutory language which, like the early days of ERISA, will be a source of full employment for lawyers, actuaries and government regulators for years to come. Furthermore, such a complex piece of legislation ensures that a substantial technical corrections bill will be forthcoming almost immediately to address those problems with the statute that are readily identifiable. Plans are expected to comply with the law’s effective dates, meaning that trustees will have their work cut out for them as they attempt to quickly grasp the implications of these new rules without the benefit of the 30 years of accumulated experience under previous law on which we have come to rely.

The most significant change brought about by the PPA involves the reinstatement of trustees' of "Red Zone" plans authority to modify certain benefits in order to preserve the plan's long-term financial viability. Although the Act imposes significant new reporting and disclosure requirements that are likely to generate a substantial increase in communications with all of the plan's stakeholders, perhaps the greatest communication challenges for plan trustees and administrative staff will be those related to informing plan participants of these plans of changes to their benefits in a straightforward, yet sensitive manner.

The rules for plans facing deteriorating plan funding will require a new understanding of the role of the bargaining parties as partners in this process, that extend well beyond their traditional roles. Effective dates for benefit modification provisions applicable to endangered "Yellow Zone" or critical "Red Zone" status plans will have an impact on the terms and duration of collective bargaining agreements.

Investment policies and asset allocation strategies will need to be revisited in light of a plan's potentially new risk tolerance. Plans that are well funded, but beginning to experience some degree of erosion in funding may become more risk averse and favor greater use of asset / liability matching strategies, while plans that are clearly in critical status may have a greater need for additional absolute investment returns causing them to investigate alternative investments to allow contributing employers to remain competitive as they attempt to meet their new funding benchmarks.

In the short-run, trustees and plan professionals will have a much greater need for education. Therefore, plan administrators may find it useful to revisit the fund's educational reimbursement policy to enable the trustees and their advisors to avail themselves of additional educational opportunities that are already beginning to be made available. Although the implications of the new funding rules are very plan specific, depending on the funded status of each fund, it is important for trustees to learn as much as possible about the new rules to help them understand the questions that need to be asked of their advisors and the implications for the plan of the answers that are given.

The NCCMP will continue its' active involvement in the process, through technical corrections and the development of applicable regulations, seeking input from our membership and keeping you apprised of developments as they occur. Meanwhile, in anticipation of the technical corrections process, we invite you to submit your thoughts, comments and concerns regarding aspects of the PPA which should be addressed through that process to us via e-mail at the address shown below.

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*As in all matters concerning interpretations of the law and / or regulations applicable to multiemployer plans, Plan trustees and sponsors should rely on their own attorneys and other professional advisors for advice on the meaning and application of the Pension Protection Act of 2006 to their particular funds.*

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*If you have questions about the NCCMP, or about this or other issues of Multi-Elert, please contact us by phone at (202) 737-5315, fax at (202) 737-1308, or by e-mail at: [nccmp@nccmp.org](mailto:nccmp@nccmp.org).  
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## **Highlights of the Multiemployer Provisions of the Pension Protection Act of 2006**

In response to requests from trustees and sponsors of multiemployer defined benefit plans who have asked for an overview of the new multiemployer funding rules in the massive, recently enacted Pension Protection Act of 2006 (“PPA”), we have prepared the following summary for your reference. This is presented in a “Readers Digest” condensed version format. This summary is not intended to cover all aspects of the PPA, but to provide the foundation upon which to build as you learn more about the Act and its implications for your plans. A more in-depth summary, presented in a side-by-side format showing the previous law requirements with those that have changed in the PPA, is also attached for those with greater interest in learning the details.

### **Traffic Light Analogy**

The multiemployer funding provisions of the PPA have been likened to a traffic light. For the majority of plans (approximately 70% of all plans) that have no projected current, short-, or mid-term funding problems (the so-called Green Zone plans), the Act attempts to strengthen funding to reduce the likelihood such plans will ever develop funding problems. Plans that begin to experience some erosion of their funded status (falling below 80% funded) or which face a funding deficiency within the next seven years (an estimated 20% to 25% of all plans - the so-called Yellow Zone plans) are referred to in the Act as “Endangered” or “Seriously Endangered” plans for which increased discipline is imposed to improve the plans’ status over time. The remaining 5% to 10% of all plans – those that face the greatest challenges (known as Red Zone or “Critical Status” plans) are subject to the greatest operational and structural changes. The rules that broadly define these categories and a summary of the changes that will affect plans in each category are presented below. The rules for the Yellow and Red Zone categories include rigorous funding benchmarks intended to preserve the plans and the benefits payable to their participants for current and future generations.

Although it is not part of the new funding rules, the multiemployer community welcomes the fact that the new law makes permanent the increases in the 415 limits and other pension-related improvements added by the 2001 EGTRRA, which otherwise would have expired at the end of 2010. In addition to the changes governing multiemployer plans, the PPA made numerous fundamental changes to: the funding rules for single employer plans; hybrid plans; investment advice; the structure, funding and operation of the Pension Benefit Guaranty Corporation; rules that enable (under certain circumstances) excess assets of over-funded multiemployer plans to be transferred to companion pension plans; and a host of other issues that are not addressed in this summary.

With respect to these issues and, as always, any information pertaining to the application of laws and regulations to your specific plans, we encourage you to seek the advice of fund counsel and your other professional advisors. The interpretations provided by the NCCMP are not, nor should you consider them to be, legal advice.

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## GREEN ZONE

- **Applies to** the approximately 70% of all (well funded) plans.
- The **amortization period for benefit improvements and changes in actuarial assumptions is reduced from 30 to 15 years.**
  - The cost of benefit **improvements paid out over 14 years or less is amortized over the period over which the benefits are paid** (for example, a 13<sup>th</sup> check is a one time payment that must be recognized in the year in which it is paid).
- The **25% of compensation aggregate limit on contributions to defined benefit and defined contribution plans that cover the same people no longer applies to multiemployer plans.** Pension and annuity funds are still subject to their own individual deduction limits.
- One part of the prior **maximum deductible limits** that required fully funded plans to declare contribution holidays or improve benefits in order to preserve the current deductibility of employer contributions, **has been raised from 100% to 140% of the plan's current liability**, allowing plans to accumulate reserves in good times to protect against market contractions or other unforeseen events that may have a serious impact on the plans funded status.
- **Plans facing a funding deficiency within 10 years may elect to adopt an automatic five-year amortization extension under IRC § 412(e)** (at the plan's interest rate) if no such extension or adoption of the shortfall method has been used in the preceding five years, and if the trustees have a program in place to improve plan funding. Plans may also apply to the IRS for an additional extension of five years.

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## YELLOW ZONE

- Defined as **plans funded below 80% or which face a funding deficiency within seven years** (approximately 20% to 25% of all plans). Plans meeting both criteria are considered "Seriously Endangered" plans (about half of the Yellow Zone plans).
- **The plan's actuary must certify the plan's funded status by 90 days of the start of the plan year** (whether a plan is in Endangered or Critical status, or neither).
- **Notice of funded status** (including Endangered or Critical status) **must be provided within 30 days** to plan stakeholders (participants, sponsoring employers and unions and government agencies).
- **Trustees of Endangered plans must develop a "Funding Improvement Plan" (FIP)** within 240 days of the due date of the actuarial certification designed to improve the plan's funded status by one-third of the way between its funded position when it entered Endangered status and 100% over the ten year Funding Improvement Period (or, for "Seriously Endangered" plans the benchmark is a one-fifth reduction of the difference over fifteen years).

- **Prior to the adoption of the FIP** restrictions apply, including for:
    - **Endangered Plans:**
      - No reductions in contribution rates
      - No contribution holidays
      - No bargaining agreements that exclude new hires
      - No benefit improvements except as required as a condition of tax qualification
    - For **Seriously Endangered Plans:**
      - The trustees must take interim steps to improve the plan's funded position or delay a funding deficiency by at least one year (through reductions in future benefits or through the use of the automatic amortization extension).
  - **Following the adoption of the FIP** Endangered plans may not:
    - **Accept a collective bargaining agreement that:**
      - Is inconsistent with the FIP
      - Provides for a reduction in the contribution rate
      - Permits contribution holidays or
      - Excludes new hires
    - **Adopt benefit improvements unless** certified by the actuary that it is consistent with the FIP and is **funded through contributions not required to meet the FIP.**
  - **Sanctions** apply to:
    - **Trustees** of plans that fail to adopt a FIP
    - **Employers** that fail to comply with the contribution requirements of its terms, and
    - **Employers** that contribute to plans that fail to meet the required benchmarks unless the failure of a Seriously Endangered plan is due to reasonable cause such as a sharp market fluctuation.
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## **RED ZONE**

- **Applies to** the approximately 5% to 10% of **the most seriously under funded plans.**
- **Triggers for Critical Status** – those plans facing:
  - **Solvency Problems:**
    - The sum of plan assets and reasonably anticipated contributions is less than the projected benefit and administrative expenses for the next five years (seven years if the plan is less than 65% funded)
  - **Funding Deficiency Problems:**
    - The plan is expected to experience a funding deficiency in the next four years (five years if the plans is less than 65% funded)

- **Demographic Problems:**
  - Present value of vested benefit for retirees and terminated vested participants exceeds that of the active participants, and
  - The plans normal cost plus interest on the unfunded liabilities for the plan year exceeds the reasonably anticipated contributions for the year, and
  - The plan is expected to have a funding deficiency within the next five years
- **Actuarial Certification of status is required** by 90 days of the beginning of the plan year and, **if Critical:**
  - **Notice must be provided to all stakeholders** within 30 days of the date the certification is due. Participants must be advised of potential benefit modifications subsequent to the notice and employers must be notified of their obligation to pay temporary surcharges.
  - **Employers must** be provided 30 days notice of requirement to **pay surcharge equal to 5% of current contribution rate** (increasing to 10% for succeeding plan years until rates are renegotiated) which goes exclusively to reducing the under funding (not benefits)
  - **Benefit restrictions are imposed** preventing payment of lump-sums, partial lump-sums or new Social Security level income option benefits to people whose benefits start after they are notified that the plan is in the Red Zone.
- **Trustees are required to develop a “Rehabilitation Plan”** within 240 days of the due date for the actuarial certification
  - Must be **designed to take plan out of Critical Status within the Rehabilitation period** (generally a 10 year period beginning on the first day of the plan year that begins after the earlier of 2 years after the adoption of the Rehabilitation plan, or the expiration of those bargaining agreements in effect at the time of the actuarial certification and which cover at least 75% of the plan’s active participants).
  - **Trustees must provide Bargaining Parties with a schedule** that lays out the benefit modifications required to meet the Rehabilitation Plan at the current contribution rates and the contribution rate increases, if any, that are required after future accruals are reduced (but not below 1% or the actuarial equivalent (or the current rate if lower)) and “adjustable benefits” are reduced to the maximum extent permitted by law (the “default schedule”) and may take into account amortization extensions, mergers or expense reductions. Optional schedules may be provided.
  - **The bargaining parties must bargain over contribution rates** required to meet Rehabilitation Plan
    - If agreement is reached, surcharges are eliminated and the new schedule is implemented
    - If no agreement is reached within 180 days of the expiration of the prior agreement or by such time as an impasse is declared, the default schedule is imposed and surcharges continue in effect.
- **“Adjustable Benefits” include:**
  - **Benefits, rights and features** under the plan **including post-retirement death benefits, 60 month guarantees, disability benefits not yet in pay status,** and similar benefits



- Any **early retirement benefit or retirement type subsidy** and any benefit payment option other than the 50% Qualified Joint & Survivor Annuity; and
- **Benefit increases** that would not be eligible for PBGC guarantee on the first day the plan entered critical status because the increases were **adopted** (or, if later, took effect) **less than 60 months before the plan entered Critical Status**
- **Benefit changes and contribution surcharges are disregarded in calculating an employer’s withdrawal liability**
- **Protections for Participants** of Critical Status Plans:
  - **Except for the repeal of recent benefit increases, benefits may not be modified** for anyone who retires prior to being notified of the plan’s certification as a critical status plan
  - **Normal retirement benefits at normal retirement age may not be modified**
  - Unless specifically bargained, **accruals may not be reduced below 1%** or the actuarial equivalent (or the plan’s existing rate if already lower).
  - Union trustees, union bargaining representatives and the union member participation in contract ratification process provide participants with additional protections
- **Protections for Employers** of Critical Status Plans:
  - Contributing **employers are protected against additional contribution and excise tax requirements** if a Critical plan experiences a funding deficiency provided that the rehabilitation plan is adopted and the scheduled funding requirements are met
  - **Sanctions apply if the plan fails to meet such requirements** or if the plan fails to meet the funding benchmark by the end of the Rehabilitation period (or fails to make scheduled progress for 3 consecutive years) unless the reason for such failure was beyond the control of the plan fiduciaries
- **General restrictions on benefit improvements:**
  - **No benefit improvements**, including future accruals, **unless** the actuary certifies that such increase is **paid for out of additional contributions** not contemplated in the Rehabilitation Plan and, after taking account of the additional costs, that the plan is reasonably expected to emerge from Critical Status by the end of the Rehabilitation period.
  - The foregoing **restrictions do not apply to benefits reduced pursuant to a plan amendment between January 1, 2002 and June 30, 2005** and which were restored pursuant to a formal amendment to the plan or trust agreements or a formal written communication to participants provided prior to June 30, 2005.
- **Changes to withdrawal liability provisions –**
  - **Schedule for small employers** (in ERISA §4225(a)) that places a limit on withdrawal liability for solvent employers **who leave plans through liquidation** was updated for first time since MPPAA.

- Clarified that **partial liability** may be assessed if an employer transfers work to an entity or entities owned or controlled by the employer
- **Construction industry plans may now use “free-look” and “fresh start”** rules to encourage new employer participation
- A **new provision** is included that **applies to certain employers alleged to have engaged in an “evade or avoid” transaction at least 5 years before the date of withdrawal** (2 years for “small employers” defined as having fewer than 500 employees, fewer than 250 of whom are plan participants). **For the entity that would be liable solely because of the alleged transaction, the provision waives interim withdrawal liability payments for 12 months** while dispute is being resolved. If a resolution has not been reached within that time, the employer must post a bond equal to 12 months of such payments, renewable 12 months thereafter.
- **Disclosure** - Among the most significant disclosure items are:
  - **The plan’s annual funding notice to all stakeholders** (participants, contributing employers, sponsoring unions, and relevant federal agencies) must report **the plan’s funded percentage** (up to 100%) and **the value of assets and liabilities for the current and the prior two years** (on the basis used by the actuary for funding rather than on a current liability basis) **plus**, among other things:
    - The **plan’s funding policy and asset allocation**
    - The **number of active, inactive vested and retired participants** in pay status
    - This **notice must be given by 120 days after the end of the plan year.**
  - If the plan falls into either Endangered or Critical status, advise stakeholders of that fact.
    - **Notices of Critical status must also advise participants of the potential for benefit modifications** pursuant to the plan’s Rehabilitation plan and alert employers of their obligation to pay the temporary surcharges.
    - Stakeholders must receive a **summary of the plan’s Funding Improvement or Rehabilitation plans** and annual updates thereafter.
  - **Upon request, plans must** within 30 days of such request, **provide** any plan participant, beneficiary, sponsoring union or contributing employer with **financial and/or actuarial information (except proprietary information or confidential participant data) that have been in the plan’s possession for at least 30 days** prior to the request. Summary information may be provided if requested by the participant.
  - Not more than once every 12 months, plans must, **upon request, provide an estimate of a contributing employer’s withdrawal liability**, including the methods, assumptions and data regarding employer contributions, unfunded vested benefits, annual changes in unfunded vested liabilities and any liability limitations applied in determining the estimated withdrawal liability. As under current law, **plans can charge employers the reasonable cost of preparing this estimate.**

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## Other noteworthy items:

- **Effective Dates** - In general, **the PPA becomes effective for plan years beginning after 2007**
- **Sunset provisions** – **The funding rules** modified by this Act are subject to a review to be conducted by the Secretaries of Labor and Treasury and the Director of the PBGC not later than December 31, 2011 and **are scheduled to “Sunset” after December 31, 2014.**