



JOINT COMMITTEE ON TAXATION

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**TESTIMONY OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION
BEFORE THE JOINT SELECT COMMITTEE ON THE SOLVENCY OF
MULTIEMPLOYER PENSION PLANS**

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My name is Thomas A. Barthold. I am the Chief of Staff of the Joint Committee on Taxation. It is my pleasure to present to the Joint Select Committee on the Solvency of Multiemployer Pension Plans an overview of the Internal Revenue Code (“the Code”) provisions governing multiemployer defined benefit plans.

Most individuals covered by a pension plan are covered by single employer plans. These plans may be defined benefits plans or defined contribution plans. The Code provides rules governing employer funding of the future pension benefits provided by defined benefit plans. However, at present, approximately 10.5 million individuals are participants in one or more of approximately 1,400 multiemployer defined benefit plans. A multiemployer plan (also known as a “Taft-Hartley” plan) is a plan maintained pursuant to one or more collective bargaining agreements with two or more unrelated employers and to which the employees are required to contribute under the collective bargaining agreement(s). A multiemployer plan is not operated by the contributing employers; instead, it is governed by a board of trustees (“joint board”) consisting of labor and employer representatives. In applying Code and ERISA requirements, the joint board has a status similar to an employer maintaining a single-employer plan and is referred to as the “plan sponsor.”

The outline that follows highlights the defined benefit Code provisions governing multiemployer plans.

OVERVIEW OF MULTIEMPLOYER DEFINED BENEFIT PLANS



**Prepared by the Staff of the Joint Committee on Taxation
for the Joint Select Committee on the Solvency of Multiemployer Pension Plans
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Topics

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- ❑ Qualified Retirement Plans Generally
- ❑ Defined Benefit Plans
 - ❑ Structures, general requirements, selected requirements (including anti-cutback rule)
- ❑ Multiemployer Plans
 - ❑ Background, Pension Benefit Guaranty Corporation (“PBGC”) program
 - ❑ Exceptions to anti-cutback rules
 - ❑ Funding rules (including withdrawal liability)
 - ❑ History of multiemployer plan funding issues
- ❑ Appendix: Brief Legislative History of Significant Changes Relating to Multiemployer Plans

Employer-Sponsored Qualified Retirement Plans

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- ❑ Tax-favored treatment applies to a deferred compensation plan that meets qualification requirements under the Code, as a “qualified retirement plan,” of which there are two general types:
 - ❑ Defined contribution – benefits based on separate account for each participant (employee), with contributions, earnings, and losses allocated to each individual participant account; participant benefits from investment gain and bears risk of investment loss
 - ❑ Defined benefit – benefits are under a plan formula and paid from plan assets, not from individual accounts; employer responsible for providing sufficient assets to pay benefits at retirement
- ❑ Tax-favored treatment generally includes:
 - ❑ Pretax treatment of contributions, with current deduction for employer (both subject to limits)
 - ❑ Tax-deferred earnings for participant
 - ❑ Income inclusion to participant at distribution (with option to rollover for certain plans)
 - ❑ Tax-exempt status for trust holding plan assets

General Requirements for Qualified Retirement Plans

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- ❑ Plan qualification requirements
 - ❑ Participant and beneficiary protections (e.g., age and service conditions, vesting, spousal protections) that parallel protections in Employee Retirement Income Security Act of 1974 (“ERISA”)
 - ❖ ERISA is within Department of Labor (“DOL”) jurisdiction
 - ❑ Limits on benefits and contributions (Code only)
 - ❑ No discrimination in favor of highly compensated employees (Code only)
 - ❑ Requirements generally apply on a controlled-group basis
- ❑ Prohibited transaction rules, *i.e.*, no self-dealing (Code and ERISA)
- ❑ Limitations on employer deduction for contributions (Code only)
- ❑ Rules specific to defined benefit plans, and to multiemployer plans

Defined Benefit Plans – In General

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- ❑ A defined benefit plan generally provides accrued benefits as an annuity commencing at normal retirement age in the amount determined under the plan's stated benefit formula (generally based on years of service and compensation of participant)
 - ❑ The accrued benefit is the portion of the participant's normal retirement benefit that has been earned as of a given time
 - ❑ Optional forms must provide payments that are not less than actuarial equivalent of accrued benefit
- ❑ The Code and ERISA require benefits to be funded using a trust for the exclusive benefit of employees and beneficiaries
- ❑ The employer (or employers) must fund the trust by making a minimum level of annual contributions
 - ❑ Investment gains and losses on trust assets affect employers' funding obligations
- ❑ Private plan benefits generally (and all multiemployer plan benefits) are insured by the PBGC, subject to guarantee limits

General Requirements for Defined Benefit Plans

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- ❑ Cannot make in-service distributions before earliest of normal retirement age, age 62, or plan termination
- ❑ Spousal protections (applicable if present value of accrued benefit is more than \$5,000)
 - ❑ For married participant, benefit must be a life annuity for employee with a survivor annuity for spouse (unless spouse consents otherwise)
 - ❑ If employee dies before benefits commence, an annuity for surviving spouse generally required
- ❑ Limits on benefits – Benefits under a defined benefit plan are generally limited to lesser of 100 percent of high three-year average compensation or annual dollar amount (\$220,000 for 2018), with actuarial adjustments depending on form of benefit and age of commencement
 - ❑ However, the 100 percent of compensation limit does not apply to multiemployer plans
- ❑ Nondiscrimination requirements – Prohibit discrimination in favor of highly compensated employees
 - ❑ Collectively bargained plans, including multiemployer plans, are generally deemed to automatically satisfy the nondiscrimination requirements

Selected Rules for Determining a Participant's Benefit in a Defined Benefit Plan

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- ❑ Definitely determinable benefit – Plan must specify the formula for objectively determining normal retirement benefits (e.g., traditional formula or hybrid formula, such as cash balance) and actuarial factors for determining other forms of benefit
 - ❑ Cannot be subject to plan sponsor discretion
 - ❑ Formula may include a variable factor, such as a market index, as long as specified in the plan and determinable without plan sponsor discretion
- ❑ Accrual rules for benefit – Plan must specify the method used to determine a participant's accrued benefit under of three permissible methods (133 ⅓ percent, fractional, or three percent)
- ❑ Vesting requirements – Participant's entitlement to accrued benefit without additional service, *i.e.*, as if terminating employment, cannot be forfeited (“vested accrued benefit”)
 - ❑ Traditional plan: 5-year cliff (zero vesting before 5 years, then 100 percent vesting at 5 years) or 3-to-7-year graduated vesting (20 percent per year)
 - ❑ Hybrid plan: 3-year cliff
- ❑ Anti-cutback requirements – next slide

Anti-Cutback Requirements for Defined Benefit Plans

- ❑ Under the “anti-cutback” rules, plan amendments generally may not reduce benefits already earned (accrued benefits) or eliminate other forms of benefit linked to accrued benefit (e.g., subsidized early retirement benefit or lump sum)
- ❑ Benefit reductions or elimination of benefit forms must be for prospective accruals only, subject to some exceptions, including for underfunded plans
- ❑ Reductions in dollar amount of benefits allowed if resulting from application of permissible variable factors

Defined Benefit Plan Structures

- ❑ Three structures:
 - ❑ Single-employer plan – maintained solely for employees of a single employer with controlled group members treated as a single employer
 - ❑ Multiple-employer plan – maintained for employees of unrelated but associated employers, such as employers in the same industry (e.g., rural electric coops); subject to much the same funding rules as single-employer plans
 - ❑ Multiemployer plan (also called “Taft-Hartley”) – maintained under collectively bargaining agreements with two or more unrelated employers, generally in the same industry (e.g., hotel and restaurant)

Multiemployer Plans – Background

- ❑ Multiemployer plans provide benefits based on service for all participating employers and are common in industries where employees regularly work for more than one employer over the course of the year or over their careers, but they also cover employees who work for only one employer over their careers
- ❑ A multiemployer plan is generally governed by a joint labor-management board of trustees (“joint board”) with equal representation of employees and employers; however, as a legal matter, like all qualified plans, the plan (and plan assets) must be administered for the exclusive benefit of the employees and beneficiaries
- ❑ Multiemployer plans cover employees in many industries across the economy, including construction, transportation, retail food, hotel and restaurant, healthcare, manufacturing, and entertainment
- ❑ Based on PBGC premium filings for 2016, there are nearly 10.5 million participants in 1,375 multiemployer plans; some very large (10,000 or more participants), some small (fewer than 250 participants), and some at all sizes in between
- ❑ Many employers participating in multiemployer plans are small employers; many mid-sized and large employers also have employees covered by multiemployer plans

Multiemployer Program of the PBGC

- ❑ The PBGC, a corporation within the DOL, was created under ERISA to provide an insurance program for benefits under most defined benefit plans maintained by private employers
 - ❑ Insures pension benefits under separate programs for single-employer and multiemployer defined benefit plans
 - ❑ Board of directors consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce
- ❑ The PBGC provides “financial assistance” in the form of loans to insolvent multiemployer plans (plans unable to pay basic PBGC-guaranteed benefits when due) in the amount needed for the plan to pay benefits at the guarantee level (to be repaid if the plan’s funded status later improves)
 - ❑ Under the single-employer program, when an underfunded single-employer plan terminates, the PBGC steps in, takes over the plan and its assets, and pays benefits

Multiemployer Program of the PBGC (cont'd)

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- ❑ In addition to providing financial assistance to an insolvent multiemployer plan, the PBGC has authority with respect to mergers and asset transfers between multiemployer plans and partitions of multiemployer plans
- ❑ For multiemployer plans, the PBGC benefit guarantee level is the sum of (1) 100% of the first \$11 of vested monthly benefits and (2) 75% of the next \$33 of vested monthly benefits, multiplied by the participant's number of years of service
 - ❑ For single-employer plans, the formula for the guarantee level is determined differently (including being based on the participant's age and payment form)
- ❑ For a multiemployer plan, the per-participant flat-rate premium for 2018 is \$28
 - ❑ For a single-employer plan, the per-participant flat-rate premium for 2018 is \$74; for a plan with unfunded vested benefits, a variable rate premium of \$38 per \$1,000 of unfunded vested benefits also applies; a termination premium could also apply

Exceptions to Anti-Cutback Rules for Multiemployer Plans of Certain Status

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- ❑ Exceptions (subject to notice and other procedural requirements) apply to three categories of plan –
 - ❑ Critical status plans
 - ❑ Insolvent status plans
 - ❑ Critical and declining status plans

Exceptions to Anti-Cutback Rules: Definition of Critical Status Plan

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- Critical status – four separate standards. If as of the beginning of the plan year:
 1. The plan's funded percentage is less than 65 percent, and the sum of (a) plan assets' market value and (b) the present value of reasonably anticipated employer and employee contributions for the current year and next 6 years (assuming that the terms of the collective bargaining agreements continue in effect) is less than (c) the present value of all benefits projected to be payable during that same period of time (plus administrative expenses);
 2. The plan, not taking into account any amortization extensions, either: (1) has an accumulated funding deficiency for the current year, or (2) is projected to have an accumulated funding deficiency for any of the next three years (four years if the funded percentage of the plan is 65 percent or less);

Exceptions to Anti-Cutback Rules:

Definition of Critical Status Plan (cont'd)

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- Critical status (cont'd) – four separate standards. If as of the beginning of the plan year:
 3. Either (1) the sum of (a) the plan's current year normal cost and (b) interest for the current year on the amount of unfunded benefit liabilities as of the last day of the preceding year, exceeds (c) the present value of the reasonably anticipated employer contributions for the current year, (2) the present value of inactive participants' vested benefits is greater than the present value of active participants' vested benefits, or (3) the plan has an accumulated funding deficiency for the current year, or is projected to have one for any of the next four years, not taking into account amortization extensions; or
 4. The sum of (a) the plan assets' market value and (b) the present value of reasonably anticipated employer contributions for the current year and each of the next four years (assuming that the terms of the collective bargaining agreements continue in effect) is less than (c) the present value of all benefits projected to be payable under the plan during the current year and each of the next four years (plus administrative expenses).

If the plan is not in critical status under one of these standards, but is projected to be in critical status in any of the next five years, the plan sponsor may elect to treat the plan as in critical status.

Exceptions to Anti-Cutback Rules: Definitions of Insolvent & Critical and Declining Status Plans

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- ❑ Exceptions apply to three categories of plan – (1) critical, (2) insolvent, (3) critical and declining (cont'd):
 - ❑ Insolvent status – occurs when available resources in a plan year are not sufficient to pay plan benefits for that plan year, or when the plan sponsor of critical plan determines that the plan's available resources are not sufficient to pay benefits coming due in next plan year
 - ❑ Critical and declining status – occurs when the plan otherwise meets one of the definitions of critical status and is projected to become insolvent in the current plan year or any of the next 14 plan years (19 years if the ratio of inactive plan participants to active plan participants is more than 2:1 or the plan's funded percentage is less than 80 percent)

Exceptions to Anti-Cutback Rules for Critical Status Plans

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- ❑ For critical plans:
 - ❑ For participants and beneficiaries whose benefits begin after receiving the notice of the plan's critical status:
 - ❖ Payments in excess of single life annuity (plus any social security supplement, if applicable) can be eliminated
 - ❖ Plan sponsor may make certain reductions to “adjustable benefits” that the plan sponsor deems appropriate
 - “Adjustable benefits” include disability benefits not in pay status, early retirement benefits or retirement-type subsidies, and most benefit payment options, but not the amount of an accrued benefit payable at normal retirement age

Exceptions to Anti-Cutback Rules for Insolvent Status Plans

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- ❑ For insolvent plans:
 - ❑ Benefits must be reduced to level that can be covered by plan's assets
 - ❑ Suspension of benefit payments must apply in substantially uniform proportions to benefits of all persons in pay status (although Treasury rules may allow for equitable variations for different participant groups to reflect differences in contribution rates and other relevant factors)
 - ❑ Benefits may not be reduced below level guaranteed under PBGC's multiemployer program
 - ❖ If plan assets are insufficient to pay benefits at the guarantee level, PBGC provides financial assistance

Exceptions to Anti-Cutback Rules for Critical and Declining Status Plans

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- ❑ For critical and declining plans where (1) actuary certifies that benefit suspensions are projected to avoid insolvency and (2) plan sponsor determines (despite taking all reasonable measures) that plan is projected to become insolvent unless benefits are suspended, then:
 - ❑ Plan sponsor may determine the amount of benefit suspensions and how the suspensions apply to participants and beneficiaries
 - ❖ Benefits cannot be reduced below 110 percent of the monthly PBGC guarantee level
 - ❖ Limited reductions for those between ages 75 and 80; no reductions for those age 80 and over
 - ❖ In the aggregate, benefit suspensions must be “reasonably estimated” to achieve – but not materially exceed – the level needed to avoid insolvency

General Funding Rules for Multiemployer Plans

- ❑ Funding rules exist to ensure that plan trust maintains sufficient assets to meet its anticipated obligations to pay current and future benefits to participants and beneficiaries
- ❑ Each plan must maintain a “funding standard account” – a notional account maintained over the entire life of the plan into which “charges” and “credits” are made each plan year
 - ❑ “Charges” include the cost of benefits earned that year (“normal cost”), increased liabilities from any benefit increases, and losses from worse than expected investment return or actuarial experience
 - ❑ “Credits” include contributions for that year (including withdrawal liability payments), reduced liabilities resulting from any benefit decreases, gains from better than expected investment return or actuarial experience

General Funding Rules for Multiemployer Plans (cont'd)

- ❑ A multiemployer plan is required to use an acceptable actuarial cost method (plan's funding method) to determine the elements included in its funding standard account for a year
 - ❑ Actuarial assumptions used in funding computations, including interest rate, must be reasonable – but no specific interest rate or mortality assumptions are prescribed by statute
 - ❑ Value of plan assets generally are determined using an actuarial valuation method, which recognizes better or worse than expected investment experience over a period of years, thereby smoothing changes in asset values
 - ❑ Charges and credits attributable to benefit increases or decreases and actuarial experience are also amortized (that is, recognized for funding purposes) over a specified number of years (generally 15 years)

General Funding Rules for Multiemployer Plans (cont'd)

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- ❑ Annual minimum required contributions are the amount (if any) needed to balance the accumulated charges and credits to the funding standard account – calculated using an acceptable actuarial funding method
- ❑ A “funding deficiency” results when accumulated charges to the funding standard account exceed credits, which generally triggers an excise tax on employers unless a waiver is obtained
- ❑ A “credit balance” results when accumulated credits to the funding standard account exceed charges, which reduces the employer contributions needed to balance the funding standard account in future years

Additional Funding Requirements for Significantly Underfunded Plans (in Endangered or Critical Status)

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- ❑ There are three categories of underfunded multiemployer plans – (1) endangered, (2) seriously endangered, (3) critical
 - ❑ Endangered status generally means the plan is not in critical status and as of the beginning of the plan year (1) the plan's funded percentage for the year is less than 80 percent or (2) the plan has an accumulated funding deficiency for the plan year or is projected to have an accumulated funding deficiency in any of the next six years (taking into account amortization extensions)
 - ❑ Seriously endangered status means the plan meets both requirements of an endangered plan
 - ❑ A critical status plan is defined as it is for purposes of the exceptions to anti-cutback rules
- ❑ Endangered plans must adopt a funding improvement plan
- ❑ Critical plans must adopt a rehabilitation plan
- ❑ ERISA penalties or Code excise taxes may apply (depending on funding status and certain other rules) to violations of applicable rules
- ❑ An annual actuarial certification as to the plan's status is required within a certain timeframe

Funding Improvement Plan for Endangered Plans

- ❑ Generally, a funding improvement plan consists of actions, including options (or a range of options), to be proposed to the bargaining parties by the plan, based on reasonable anticipated experience and reasonable actuarial assumptions for the attainment of certain “applicable benchmarks” over the “funding improvement period”
 - ❑ Possible actions include contribution increases and benefit reductions, such as reducing future accrual rates and elimination of benefits not protected under the anti-cutback rules (for example, most disability and death benefits)
 - ❑ The funding improvement period is generally a 10-year period – and may end earlier if the plan is no longer in endangered status or if the plan enters critical status
 - ❑ The funding improvement period generally cannot begin until the plan year that begins after the second anniversary of the date of adoption of the funding improvement plan. However, it could begin earlier depending on when collective bargaining agreements expire

Funding Improvement Plan for Endangered Plans (cont'd)

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- ❑ For plans that are endangered, but not seriously endangered, by the end of the funding improvement period, the plan's funded percentage must increase by 33 percent of the difference between 100 percent and the funded percentage of the plan at the beginning of the first plan year for which the plan is in endangered status
 - ❑ The plan also must not have an accumulated funding deficiency for the last plan year in the funding improvement period
- ❑ For plans that are seriously endangered, different percentage improvements and periods may be substituted in certain circumstances, depending upon the plan's funded percentage at the beginning of the funding improvement period and certain other facts

Rehabilitation Plan for Critical Plans

- ❑ Generally, a rehabilitation plan consists of actions, including options (or a range of options), to be proposed to the bargaining parties by the plan, formulated based on reasonable anticipated experience and reasonable actuarial assumptions to enable the plan to cease to be in critical status by the end of the rehabilitation period
 - ❑ Possible actions include reductions in plan expenditures including plan mergers and consolidations, reductions in future benefit accruals, or increases in contributions
- ❑ The rehabilitation period is generally a 10-year period, determined in the same way as the 10-year period for funding improvement plans – and may end earlier if the plan emerges from critical status
- ❑ Critical plans are generally required to adopt measures to emerge from critical status, but if the plan sponsor (*i.e.*, joint board) determines emergence is not possible, instead reasonable measures must be taken to emerge from critical status at a later time or to forestall insolvency

Rehabilitation Plan for Critical Plans (cont'd)

- ❑ If a critical plan fails to make “scheduled progress” for three consecutive years or fails to meet the applicable requirements by the end of the rehabilitation period, then for excise tax purposes (unless the excise tax is waived), the plan is treated as having a funding deficiency equal to (1) the amount of the contributions necessary to leave critical status or make scheduled progress or (2) the plan’s actual funding deficiency, if any
- ❑ Certain surcharges (additional contributions) apply to certain critical status plans, with specific rules on amounts and timing – and are generally disregarded in determining an employer’s withdrawal liability

Withdrawal Liability

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- ❑ Under ERISA, if an employer withdraws from a multiemployer plan, the employer is generally liable to make ongoing payments to fund its share of unfunded vested benefits under the plan, often based on the employer's share of total plan contributions during a preceding period, rather than benefits of the employer's own employees
- ❑ Withdrawal from the plan occurs for this purpose if the employer ceases operations covered by the plan or if the employer's obligation to contribute to the plan ceases or significantly declines
- ❑ Plan sponsor must determine amount of employer's withdrawal liability and notify the employer, with a process for resolving disputes if needed
- ❑ Withdrawal liability amount is generally paid (with interest) in installments, determined in part by reference to the amount of the employer's previous contributions
- ❑ Payment period is limited to 20 years, even if installments during that period will not cover full liability amount
- ❑ Other exceptions and limitations apply

History of Multiemployer Plan Funding Issues

- ❑ The amount of employer contributions are specified in the bargaining agreement (commonly based on hours worked or units of production) – while the specified contribution level generally takes into account benefits to be earned under the plan, it historically has not been explicitly tied to the amount needed to satisfy Code/ERISA funding requirements
- ❑ If the industry has contracted (resulting in fewer active employees), the liabilities for benefits of retirees and other former employees generally have become disproportionately large compared to liabilities for benefits of current employees
- ❑ Also, liabilities under the plan include previously earned benefits for employees of employers that no longer participate in (i.e., contribute to) the plan
 - ❑ Former participating employers may have withdrawal liability, but payments may not be sufficient to cover unfunded amount or former participating employer might no longer exist
- ❑ Underfunding in many cases is too great to realistically cover with future investment income or ongoing contributions

Appendix: Brief Legislative History of Significant Changes Relating to Multiemployer Plans

- ❑ **Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, September 2, 1974**
 - ❑ Established PBGC multiemployer insurance program and provided multiemployer funding rules
- ❑ **Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, September 26, 1980**
 - ❑ Strengthened funding requirements, set new funding and benefit adjustment rules for financially weak plans, revised multiemployer insurance program, and established withdrawal liability
- ❑ **Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, December 21, 2000**
 - ❑ Increased benefit guarantee for multiemployer plans
- ❑ **Deficit Reduction Act of 2005, Pub. L. No. 109-171, February 8, 2006**
 - ❑ Increased the flat-rate per participant premium for multiemployer defined benefit plans from \$2.60 to \$8.00; for 2007 plan year and later, premium indexed to rate of growth of national average wage
- ❑ **Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, August 17, 2006**
 - ❑ Established new funding requirements, including creation of additional funding rules for plans in endangered or critical status
 - ❑ Also made revisions to amortization periods, changes to funding waivers, and revisions to reasonableness requirement for actuarial assumptions
 - ❑ Enhanced reporting and disclosure requirements

Appendix: Brief Legislative History of Significant Changes Relating to Multiemployer Plans (cont'd)

- ❑ **Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), Pub. L. No. 110-458, December 23, 2008**
 - ❑ Made technical corrections to PPA
 - ❑ Provided funding relief to multiemployer plans in response to economic downturn
- ❑ **Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), Pub. L. No. 111-192, June 25, 2010**
 - ❑ Provided funding relief in form of extended amortization periods for experience gains and losses, and also expanded the asset smoothing period where certain requirements satisfied (solvency test, additional benefit restrictions, and reporting requirements)
- ❑ **The Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, July 6, 2012**
 - ❑ Increased the 2013 PBGC premium for multiemployer defined benefit plans by \$2 per participant; after 2013, premium to be indexed for increases in annual rate of growth in national average wage index
- ❑ **Multiemployer Pension Reform Act of 2014 (MPRA), Pub. L. No. 113-235, December 16, 2014**
 - ❑ Repealed the December 31, 2014 sunset of, and made permanent, the PPA multiemployer funding rules
 - ❑ Established a new process for multiemployer pension plans in critical and declining status to propose a temporary or permanent reduction of pension benefits
 - ❑ Provided for PBGC to facilitate mergers between two or more plans (including providing financial assistance)
 - ❑ Expanded PBGC partition rules