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Devil's In The Details As Union Pension Crisis Awaits Biden

By **Emily Brill**

Law360 (January 3, 2021, 12:02 PM EST) -- President-elect Joe Biden is expected to eventually sign a legislative fix for the funding crisis currently threatening union retirees' pensions, but exactly what that solution will look like will depend on Congress, experts say.

Time is running out to secure that solution, and with it the savings of millions of union retirees, because the federal safety net for struggling union pension plans is slated to run out of money by 2026 unless Congress acts.

The long-building union pension crisis also loomed large during the Trump administration, whose most notable attempt to fix it collapsed at the end of 2018 when a bipartisan committee of lawmakers couldn't agree on a solution.

Though the lawmakers' work didn't yield a plan to prop up the system, many of the ideas generated during the Joint Select Committee on the Solvency of Multiemployer Pension Plans' eight months of hearings are still salient, attorneys say. Now, Congress just needs to pick a path and walk down it.

"The Joint Select Committee was two years ago. Frankly, the solutions to fixing the problem were there then. They've remained; it's just whether or not there's the political will to get there," said Timothy Lynch, a senior director at Morgan Lewis & Bockius LLP. "It's going to have to be addressed."

Here, Law360 looks at the prospects for pension reform and other benefits changes in 2021.

'The Ball Is In Congress' Court'

With nearly 200 plans financially struggling and relying on a federal safety net that's more than $60 billion in debt, there's no doubt that the union pension system, which is also known as the multiemployer pension system, needs help.

That safety net, an agency called the Pension Benefit Guaranty Corp. created in 1974 to protect pensioners' savings if their plan tanked, said as much this year.

"The Multiemployer Insurance Program remains severely underfunded, with a negative net position of $63.7 billion," PBGC Director Gordon Hartogensis wrote in a message accompanying the agency's 2020 annual report. "It remains clear that legislative reform is necessary to avert insolvency."

Lawmakers have recently pushed two approaches to stabilizing the union pension plan system. One, favored by Democrats, would provide direct loans to flailing plans. The other, favored by Republicans, would allow plans to pass their liabilities off onto the PBGC in an attempt to regain financial health.

The latter approach, known as "partitioning," has gained some bipartisan support, appearing in the U.S. House of Representatives' coronavirus relief package, the HEROES Act, that the chamber passed this spring. The House also approved the first approach, passing a bill called the Butch Lewis Act in 2019. But, so far, neither solution has cleared the Senate.

Biden has gotten behind the Butch Lewis Act, but ultimately "the ball is in Congress' court" when it comes to solving the union pension crisis, Lynch said.

"This cannot be solved administratively. There's no executive order that is going to solve this problem," Lynch said. "It's going to take Congress to reform this system and agree that federal dollars will go into this."

Lynch said he's optimistic that the Biden administration will be "an active player" in negotiations about funding an end to the crisis. But the amount of sway it will have will hinge on the makeup of Congress, which will be determined by Georgia's Jan. 5 runoff elections, attorneys say.

"If Democrats are able to win both [Senate] seats in Georgia, then Biden is going to have a much easier time getting his initiatives passed. If not, there's going to be a lot of compromise," said Damian Myers, a benefits attorney at Nixon Peabody LLP.

Still, attorneys are optimistic that a solution is on its way some time in the next four years.

"There does seem to be some bipartisan recognition of there being a problem, and there's been a bipartisan effort to put forward solutions, which leads me to believe there's a strong possibility that legislation can pass within the next four years," said Jeffrey Holdvogt, an employee benefits partner at McDermott Will & Emery.

Other Benefits Priorities

When the Biden administration comes into power, attorneys anticipate it will attempt to carry out certain campaign promises and roll back certain Trump-era regulations.

In the health care realm, those campaign promises include lowering Medicare's eligibility age from 65 to 60 and ending surprise medical billing, which the Trump administration had also prioritized.

Biden has also spoken of creating a government-run health insurance program or "public option" that would be broadly available to Americans who are too young for Medicare.

As for rollbacks, the administration may target a Trump-era regulation that expanded the availability of short-term, limited-duration health insurance plans, allowing consumers to use the Affordable Care Act-exempt plans for up to three years.

In the retirement arena, attorneys expect Biden, like President Barack Obama before him, to focus on implementing policies targeted at increasing Americans' retirement savings. This will likely include pushing regulations that expand automatic enrollment in 401(k) plans, attorneys say.

The Biden administration may also roll back two Trump administration policies that limit employee retirement plan caretakers' ability to advance social or political goals when investing or casting proxy votes, attorneys say.

Experts also expect the administration to strengthen the consumer protections in a recently rolled out Employee Retirement Income Security Act exemption for retirement investment advisers, whether that be through modifying the exemption or scrapping it and starting anew.

--Additional reporting by Jeff Overley. Editing by Vincent Sherry.

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