

115TH CONGRESS
2D SESSION

S. 2518

To amend title 11, United States Code, to improve protections for employees and retirees in business bankruptcies.

IN THE SENATE OF THE UNITED STATES

MARCH 7, 2018

Mr. DURBIN (for himself, Mr. WHITEHOUSE, and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 11, United States Code, to improve protections for employees and retirees in business bankruptcies.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Protecting Employees and Retirees in Business Bank-
6 ruptcies Act of 2018”.

7 (b) **TABLE OF CONTENTS.**—The table of contents of
8 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings.

TITLE I—IMPROVING RECOVERIES FOR EMPLOYEES AND
RETIREES

- Sec. 101. Increased wage priority.
 Sec. 102. Claim for stock value losses in defined contribution plans.
 Sec. 103. Priority for severance pay.
 Sec. 104. Financial returns for employees and retirees.
 Sec. 105. Priority for WARN Act damages.

TITLE II—REDUCING EMPLOYEES' AND RETIREES' LOSSES

- Sec. 201. Rejection of collective bargaining agreements.
 Sec. 202. Payment of insurance benefits to retired employees.
 Sec. 203. Protection of employee benefits in a sale of assets.
 Sec. 204. Claim for pension losses.
 Sec. 205. Payments by secured lender.
 Sec. 206. Preservation of jobs and benefits.
 Sec. 207. Termination of exclusivity.
 Sec. 208. Claim for withdrawal liability.

TITLE III—RESTRICTING EXECUTIVE COMPENSATION PROGRAMS

- Sec. 301. Executive compensation upon exit from bankruptcy.
 Sec. 302. Limitations on executive compensation enhancements.
 Sec. 303. Assumption of executive benefit plans.
 Sec. 304. Recovery of executive compensation.
 Sec. 305. Preferential compensation transfer.

TITLE IV—OTHER PROVISIONS

- Sec. 401. Union proof of claim.
 Sec. 402. Exception from automatic stay.

1 **SEC. 2. FINDINGS.**

2 The Congress finds the following:

3 (1) Business bankruptcies have increased
 4 sharply in recent years and remain at high levels.

5 These bankruptcies include several of the largest
 6 business bankruptcy filings in history. As the use of
 7 bankruptcy has expanded, job preservation and re-
 8 tirement security are placed at greater risk.

9 (2) Laws enacted to improve recoveries for em-
 10 ployees and retirees and limit their losses in bank-
 11 ruptcy cases have not kept pace with the increasing

1 and broader use of bankruptcy by businesses in all
2 sectors of the economy. However, while protections
3 for employees and retirees in bankruptcy cases have
4 eroded, management compensation plans devised for
5 those in charge of troubled businesses have become
6 more prevalent and are escaping adequate scrutiny.

7 (3) Changes in the law regarding these matters
8 are urgently needed as bankruptcy is used to ad-
9 dress increasingly more complex and diverse condi-
10 tions affecting troubled businesses and industries.

11 **TITLE I—IMPROVING RECOV-**
12 **ERIES FOR EMPLOYEES AND**
13 **RETIREES**

14 **SEC. 101. INCREASED WAGE PRIORITY.**

15 Section 507(a) of title 11, United States Code, is
16 amended—

17 (1) in paragraph (4)—

18 (A) by striking “\$10,000” and inserting
19 “\$20,000”;

20 (B) by striking “within 180 days”; and

21 (C) by striking “or the date of the ces-
22 sation of the debtor’s business, whichever oc-
23 curs first,”; and

24 (2) in paragraph (5)—

25 (A) in subparagraph (A)—

1 (i) by striking “within 180 days”; and

2 (ii) by striking “or the date of the
3 cessation of the debtor’s business, which-
4 ever occurs first”; and

5 (B) by striking subparagraph (B) and in-
6 serting the following:

7 “(B) for each such plan, to the extent of
8 the number of employees covered by each such
9 plan, multiplied by \$20,000.”.

10 **SEC. 102. CLAIM FOR STOCK VALUE LOSSES IN DEFINED**
11 **CONTRIBUTION PLANS.**

12 Section 101(5) of title 11, United States Code, is
13 amended—

14 (1) in subparagraph (A), by striking “or” at
15 the end;

16 (2) in subparagraph (B), by striking the period
17 at the end and inserting “; or”; and

18 (3) by adding at the end the following:

19 “(C) right or interest in equity securities
20 of the debtor, or an affiliate of the debtor, if—

21 “(i) the equity securities are held in a
22 defined contribution plan (within the
23 meaning of section 3(34) of the Employee
24 Retirement Income Security Act of 1974
25 (29 U.S.C. 1002(34))) for the benefit of

1 an individual who is not an insider, a sen-
2 ior executive officer, or any of the twenty
3 next most highly compensated employees of
4 the debtor (if one or more are not insid-
5 ers);

6 “(ii) the equity securities were attrib-
7 utable to either employer contributions by
8 the debtor or an affiliate of the debtor, or
9 elective deferrals (within the meaning of
10 section 402(g) of the Internal Revenue
11 Code of 1986), and any earnings thereon;
12 and

13 “(iii) an employer or plan sponsor
14 who has commenced a case under this title
15 has committed fraud with respect to such
16 plan or has otherwise breached a duty to
17 the participant that has proximately
18 caused the loss of value.”.

19 **SEC. 103. PRIORITY FOR SEVERANCE PAY.**

20 Section 503(b) of title 11, United States Code, is
21 amended—

22 (1) in paragraph (8)(B), by striking “and” at
23 the end;

24 (2) in paragraph (9), by striking the period and
25 inserting a semicolon; and

1 (3) by adding at the end the following:

2 “(10) severance pay owed to employees of the
3 debtor (other than to an insider, other senior man-
4 agement, or a consultant retained to provide services
5 to the debtor), under a plan, program, or policy gen-
6 erally applicable to employees of the debtor (but not
7 under an individual contract of employment), or
8 owed pursuant to a collective bargaining agreement,
9 for layoff or termination on or after the date of the
10 filing of the petition, which pay shall be deemed
11 earned in full upon such layoff or termination of em-
12 ployment; and”.

13 **SEC. 104. FINANCIAL RETURNS FOR EMPLOYEES AND RE-**
14 **TIREES.**

15 Section 1129(a) of title 11, United States Code is
16 amended—

17 (1) by striking paragraph (13) and inserting
18 the following:

19 “(13) With respect to retiree benefits, as that
20 term is defined in section 1114(a), the plan—

21 “(A) provides for the continuation after
22 the effective date of the plan of payment of all
23 retiree benefits at the level established pursuant
24 to subsection (e)(1)(B) or (g) of section 1114
25 at any time before the date of confirmation of

1 the plan, for the duration of the period for
2 which the debtor has obligated itself to provide
3 such benefits, or if no modifications are made
4 before confirmation of the plan, the continu-
5 ation of all such retiree benefits maintained or
6 established in whole or in part by the debtor be-
7 fore the date of the filing of the petition; and

8 “(B) provides for recovery of claims arising
9 from the modification of retiree benefits or for
10 other financial returns, as negotiated by the
11 debtor and the authorized representative (to the
12 extent that such returns are paid under, rather
13 than outside of, a plan).”; and

14 (2) by adding at the end the following:

15 “(17) The plan provides for recovery of dam-
16 ages payable for the rejection of a collective bar-
17 gaining agreement, or for other financial returns as
18 negotiated by the debtor and the authorized rep-
19 resentative under section 1113 (to the extent that
20 such returns are paid under, rather than outside of,
21 a plan).”.

22 **SEC. 105. PRIORITY FOR WARN ACT DAMAGES.**

23 Section 503(b)(1)(A)(ii) of title 11, United States
24 Code is amended to read as follows:

1 “(ii) wages and benefits awarded pursuant
2 to a judicial proceeding or a proceeding of the
3 National Labor Relations Board as back pay or
4 damages attributable to any period of time oc-
5 ccurring after the date of commencement of the
6 case under this title, as a result of a violation
7 of Federal or State law by the debtor, without
8 regard to the time of the occurrence of unlawful
9 conduct on which the award is based or to
10 whether any services were rendered on or after
11 the commencement of the case, including an
12 award by a court under section 5 of the Worker
13 Adjustment and Retraining Notification Act
14 (29 U.S.C. 2104) of up to 60 days’ pay and
15 benefits following a layoff that occurred or com-
16 menced at a time when such award period in-
17 cludes a period on or after the commencement
18 of the case, if the court determines that pay-
19 ment of wages and benefits by reason of the op-
20 eration of this clause will not substantially in-
21 crease the probability of layoff or termination of
22 current employees or of nonpayment of domes-
23 tic support obligations during the case under
24 this title;”.

1 **TITLE II—REDUCING EMPLOY-**
2 **EES’ AND RETIREES’ LOSSES**

3 **SEC. 201. REJECTION OF COLLECTIVE BARGAINING AGREE-**
4 **MENTS.**

5 Section 1113 of title 11, United States Code, is
6 amended by striking subsections (a) through (f) and in-
7 serting the following:

8 “(a) The debtor in possession, or the trustee if one
9 has been appointed under this chapter, other than a trust-
10 ee in a case covered by subchapter IV of this chapter and
11 by title I of the Railway Labor Act (45 U.S.C. 151 et
12 seq.), may reject a collective bargaining agreement only
13 in accordance with this section. In this section, a reference
14 to the trustee includes the debtor in possession.

15 “(b) No provision of this title shall be construed to
16 permit the trustee to unilaterally terminate or alter any
17 provision of a collective bargaining agreement before com-
18 plying with this section. The trustee shall timely pay all
19 monetary obligations arising under the terms of the collec-
20 tive bargaining agreement. Any such payment required to
21 be made before a plan confirmed under section 1129 is
22 effective has the status of an allowed administrative ex-
23 pense under section 503.

24 “(c)(1) If the trustee seeks modification of a collec-
25 tive bargaining agreement, the trustee shall provide notice

1 to the labor organization representing the employees cov-
2 ered by the collective bargaining agreement that modifica-
3 tions are being proposed under this section, and shall
4 promptly provide an initial proposal for modifications to
5 the collective bargaining agreement. Thereafter, the trust-
6 ee shall confer in good faith with the labor organization,
7 at reasonable times and for a reasonable period in light
8 of the complexity of the case, in attempting to reach mutu-
9 ally acceptable modifications of the collective bargaining
10 agreement.

11 “(2) The initial proposal and subsequent proposals
12 by the trustee for modification of a collective bargaining
13 agreement shall be based upon a business plan for the re-
14 organization of the debtor, and shall reflect the most com-
15 plete and reliable information available. The trustee shall
16 provide to the labor organization all information that is
17 relevant for negotiations. The court may enter a protective
18 order to prevent the disclosure of information if disclosure
19 could compromise the position of the debtor with respect
20 to the competitors in the industry of the debtor, subject
21 to the needs of the labor organization to evaluate the pro-
22 posals of the trustee and any application for rejection of
23 the collective bargaining agreement or for interim relief
24 pursuant to this section.

1 “(3) In consideration of Federal policy encouraging
2 the practice and process of collective bargaining and in
3 recognition of the bargained-for expectations of the em-
4 ployees covered by the collective bargaining agreement,
5 modifications proposed by the trustee—

6 “(A) shall be proposed only as part of a pro-
7 gram of workforce and nonworkforce cost savings
8 devised for the reorganization of the debtor, includ-
9 ing savings in management personnel costs;

10 “(B) shall be limited to modifications designed
11 to achieve a specified aggregate financial contribu-
12 tion for the employees covered by the collective bar-
13 gaining agreement (taking into consideration any
14 labor cost savings negotiated within the 12-month
15 period before the filing of the petition), and shall be
16 not more than the minimum savings essential to per-
17 mit the debtor to exit bankruptcy, such that con-
18 firmation of a plan of reorganization is not likely to
19 be followed by the liquidation, or the need for fur-
20 ther financial reorganization, of the debtor (or any
21 successor to the debtor) in the short term; and

22 “(C) shall not be disproportionate or overly bur-
23 den the employees covered by the collective bar-
24 gaining agreement, either in the amount of the cost

1 savings sought from such employees or the nature of
2 the modifications.

3 “(d)(1) If, after a period of negotiations, the trustee
4 and the labor organization have not reached an agreement
5 over mutually satisfactory modifications, and further ne-
6 gotiations are not likely to produce mutually satisfactory
7 modifications, the trustee may file a motion seeking rejec-
8 tion of the collective bargaining agreement after notice
9 and a hearing. Absent agreement of the parties, no such
10 hearing shall be held before the expiration of the 21-day
11 period beginning on the date on which notice of the hear-
12 ing is provided to the labor organization representing the
13 employees covered by the collective bargaining agreement.
14 Only the debtor and the labor organization may appear
15 and be heard at such hearing. An application for rejection
16 shall seek rejection effective upon the entry of an order
17 granting the relief.

18 “(2) In consideration of Federal policy encouraging
19 the practice and process of collective bargaining and in
20 recognition of the bargained-for expectations of the em-
21 ployees covered by the collective bargaining agreement, the
22 court may grant a motion seeking rejection of a collective
23 bargaining agreement only if, based on clear and con-
24 vincing evidence—

1 “(A) the court finds that the trustee has com-
2 plied with the requirements of subsection (c);

3 “(B) the court has considered alternative pro-
4 posals by the labor organization and has concluded
5 that such proposals do not meet the requirements of
6 subsection (c)(3)(B);

7 “(C) the court finds that further negotiations
8 regarding the proposal of the trustee or an alter-
9 native proposal by the labor organization are not
10 likely to produce an agreement;

11 “(D) the court finds that implementation of the
12 proposal of the trustee shall not—

13 “(i) cause a material diminution in the
14 purchasing power of the employees covered by
15 the collective bargaining agreement;

16 “(ii) adversely affect the ability of the
17 debtor to retain an experienced and qualified
18 workforce; or

19 “(iii) impair the labor relations of the
20 debtor such that the ability to achieve a feasible
21 reorganization would be compromised; and

22 “(E) the court concludes that rejection of the
23 collective bargaining agreement and immediate im-
24 plementation of the proposal of the trustee is essen-
25 tial to permit the debtor to exit bankruptcy, such

1 that confirmation of a plan of reorganization is not
2 likely to be followed by liquidation, or the need for
3 further financial reorganization, of the debtor (or
4 any successor to the debtor) in the short term.

5 “(3) If the trustee has implemented a program of in-
6 centive pay, bonuses, or other financial returns for insid-
7 ers, senior executive officers, or the twenty next most
8 highly compensated employees or consultants providing
9 services to the debtor during the bankruptcy, or such a
10 program was implemented within 180 days before the date
11 of the filing of the petition, the court shall presume that
12 the trustee has failed to satisfy the requirements of sub-
13 section (c)(3)(C).

14 “(4) In no case shall the court enter an order reject-
15 ing a collective bargaining agreement that would result in
16 modifications to a level lower than the level proposed by
17 the trustee in the proposal found by the court to have com-
18 plied with the requirements of this section.

19 “(5) At any time after the date on which an order
20 rejecting a collective bargaining agreement is entered, or
21 in the case of a collective bargaining agreement entered
22 into between the trustee and the labor organization pro-
23 viding mutually satisfactory modifications, at any time
24 after that collective bargaining agreement has been en-
25 tered into, the labor organization may apply to the court

1 for an order seeking an increase in the level of wages or
2 benefits, or relief from working conditions, based upon
3 changed circumstances. The court shall grant the request
4 only if the increase or other relief is not inconsistent with
5 the standard set forth in paragraph (2)(E).

6 “(e) During a period during which a collective bar-
7 gaining agreement at issue under this section continues
8 in effect, and if essential to the continuation of the busi-
9 ness of the debtor or in order to avoid irreparable damage
10 to the estate, the court, after notice and a hearing, may
11 authorize the trustee to implement interim changes in the
12 terms, conditions, wages, benefits, or work rules provided
13 by the collective bargaining agreement. Any hearing under
14 this subsection shall be scheduled in accordance with the
15 needs of the trustee. The implementation of such interim
16 changes shall not render the application for rejection
17 moot.

18 “(f)(1) Rejection of a collective bargaining agreement
19 constitutes a breach of the collective bargaining agree-
20 ment, and shall be effective no earlier than the entry of
21 an order granting such relief.

22 “(2) Notwithstanding paragraph (1), solely for pur-
23 poses of determining and allowing a claim arising from
24 the rejection of a collective bargaining agreement, rejec-
25 tion shall be treated as rejection of an executory contract

1 under section 365(g) and shall be allowed or disallowed
 2 in accordance with section 502(g)(1). No claim for rejec-
 3 tion damages shall be limited by section 502(b)(7). Eco-
 4 nomic self-help by a labor organization shall be permitted
 5 upon a court order granting a motion to reject a collective
 6 bargaining agreement under subsection (d) or pursuant to
 7 subsection (e), and no provision of this title or of any other
 8 provision of Federal or State law may be construed to the
 9 contrary.

10 “(g) The trustee shall provide for the reasonable fees
 11 and costs incurred by a labor organization under this sec-
 12 tion, upon request and after notice and a hearing.

13 “(h) A collective bargaining agreement that is as-
 14 sumed shall be assumed in accordance with section 365.”.

15 **SEC. 202. PAYMENT OF INSURANCE BENEFITS TO RETIRED**
 16 **EMPLOYEES.**

17 Section 1114 of title 11, United States Code, is
 18 amended—

19 (1) in subsection (a), by inserting “, without re-
 20 gard to whether the debtor asserts a right to unilat-
 21 erally modify such payments under such plan, fund,
 22 or program” before the period at the end;

23 (2) in subsection (b)(2), by inserting “, and a
 24 labor organization serving as the authorized rep-
 25 resentative under subsection (c)(1),” after “section”;

1 (3) by striking subsection (f) and inserting the
2 following:

3 “(f)(1) If a trustee seeks modification of retiree bene-
4 fits, the trustee shall provide a notice to the authorized
5 representative that modifications are being proposed pur-
6 suant to this section, and shall promptly provide an initial
7 proposal. Thereafter, the trustee shall confer in good faith
8 with the authorized representative at reasonable times and
9 for a reasonable period in light of the complexity of the
10 case in attempting to reach mutually satisfactory modi-
11 fications.

12 “(2) The initial proposal and subsequent proposals
13 by the trustee shall be based upon a business plan for the
14 reorganization of the debtor and shall reflect the most
15 complete and reliable information available. The trustee
16 shall provide to the authorized representative all informa-
17 tion that is relevant for the negotiations. The court may
18 enter a protective order to prevent the disclosure of infor-
19 mation if disclosure could compromise the position of the
20 debtor with respect to the competitors in the industry of
21 the debtor, subject to the needs of the authorized rep-
22 resentative to evaluate the proposals of the trustee and
23 an application pursuant to subsection (g) or (h).

24 “(3) Modifications proposed by the trustee—

1 “(A) shall be proposed only as part of a pro-
2 gram of workforce and nonworkforce cost savings
3 devised for the reorganization of the debtor, includ-
4 ing savings in management personnel costs;

5 “(B) shall be limited to modifications that are
6 designed to achieve a specified aggregate financial
7 contribution for the retiree group represented by the
8 authorized representative (taking into consideration
9 any cost savings implemented within the 12-month
10 period before the date of filing of the petition with
11 respect to the retiree group), and shall be no more
12 than the minimum savings essential to permit the
13 debtor to exit bankruptcy, such that confirmation of
14 a plan of reorganization is not likely to be followed
15 by the liquidation, or the need for further financial
16 reorganization, of the debtor (or any successor to
17 the debtor) in the short term; and

18 “(C) shall not be disproportionate or overly bur-
19 den the retiree group, either in the amount of the
20 cost savings sought from such group or the nature
21 of the modifications.”;

22 (4) in subsection (g)—

23 (A) by striking the subsection designation

24 and all that follows through the semicolon at

1 the end of paragraph (3) and inserting the fol-
2 lowing:

3 “(g)(1) If, after a period of negotiations, the trustee
4 and the authorized representative have not reached agree-
5 ment over mutually satisfactory modifications and further
6 negotiations are not likely to produce mutually satisfac-
7 tory modifications, the trustee may file a motion seeking
8 modifications in the payment of retiree benefits after no-
9 tice and a hearing. Absent agreement of the parties, no
10 such hearing shall be held before the expiration of the 21-
11 day period beginning on the date on which notice of the
12 hearing is provided to the authorized representative. Only
13 the debtor and the authorized representative may appear
14 and be heard at such hearing.

15 “(2) The court may grant a motion to modify the
16 payment of retiree benefits only if, based on clear and con-
17 vincing evidence—

18 “(A) the court finds that the trustee has com-
19 plied with the requirements of subsection (f);

20 “(B) the court has considered alternative pro-
21 posals by the authorized representative and has de-
22 termined that such proposals do not meet the re-
23 quirements of subsection (f)(3)(B);

24 “(C) the court finds that further negotiations
25 regarding the proposal of the trustee or an alter-

1 native proposal by the authorized representative are
2 not likely to produce a mutually satisfactory agree-
3 ment;

4 “(D) the court finds that implementation of the
5 proposal shall not cause irreparable harm to the af-
6 fected retirees; and

7 “(E) the court concludes that an order granting
8 the motion and immediate implementation of the
9 proposal of the trustee is essential to permit the
10 debtor to exit bankruptcy, such that confirmation of
11 a plan of reorganization is not likely to be followed
12 by liquidation, or the need for further financial reor-
13 ganization, of the debtor (or a successor to the debt-
14 or) in the short term.

15 “(3) If a trustee has implemented a program of in-
16 centive pay, bonuses, or other financial returns for insid-
17 ers, senior executive officers, or the twenty next most
18 highly compensated employees or consultants providing
19 services to the debtor during the bankruptcy, or such a
20 program was implemented within 180 days before the date
21 of the filing of the petition, the court shall presume that
22 the trustee has failed to satisfy the requirements of sub-
23 paragraph (f)(3)(C).”; and

24 (B) in the matter following paragraph

25 (3)—

1 (i) by striking “except that in no
2 case” and inserting the following:

3 “(4) In no case”; and

4 (ii) by striking “is consistent with the
5 standard set forth in paragraph (3)” and
6 inserting “assures that all creditors, the
7 debtor, and all of the affected parties are
8 treated fairly and equitably, and is clearly
9 favored by the balance of the equities”;
10 and

11 (5) by striking subsection (k) and redesignating
12 subsections (l) and (m) as subsections (k) and (l),
13 respectively.

14 **SEC. 203. PROTECTION OF EMPLOYEE BENEFITS IN A SALE**
15 **OF ASSETS.**

16 Section 363(b) of title 11, United States Code, is
17 amended by adding at the end the following:

18 “(3) In approving a sale under this subsection, the
19 court shall consider the extent to which a bidder has of-
20 fered to maintain existing jobs, preserve terms and condi-
21 tions of employment, and assume or match pension and
22 retiree health benefit obligations in determining whether
23 an offer constitutes the highest or best offer for such prop-
24 erty.”.

1 **SEC. 204. CLAIM FOR PENSION LOSSES.**

2 Section 502 of title 11, United States Code, is
3 amended by adding at the end the following:

4 “(l) The court shall allow a claim asserted by an ac-
5 tive or retired participant, or by a labor organization rep-
6 resenting such participants, in a defined benefit plan ter-
7 minated under section 4041 or 4042 of the Employee Re-
8 tirement Income Security Act of 1974 (29 U.S.C. 1341,
9 1342), for any shortfall in pension benefits accrued as of
10 the effective date of the termination of such pension plan
11 as a result of the termination of the plan and limitations
12 upon the payment of benefits imposed pursuant to section
13 4022 of that Act (29 U.S.C. 1342), notwithstanding any
14 claim asserted and collected by the Pension Benefit Guar-
15 anty Corporation with respect to such termination.

16 “(m) The court shall allow a claim of a kind described
17 in section 101(5)(C) by an active or retired participant
18 in a defined contribution plan (within the meaning of sec-
19 tion 3(34) of the Employee Retirement Income Security
20 Act of 1974 (29 U.S.C. 1002(34))), or by a labor organi-
21 zation representing such participants. The amount of such
22 claim shall be measured by the market value of the stock
23 at the time of contribution to, or purchase by, the plan
24 and the value as of the commencement of the case.”.

1 **SEC. 205. PAYMENTS BY SECURED LENDER.**

2 Section 506(c) of title 11, United States Code, is
3 amended by adding at the end the following: “If employees
4 have not received wages, accrued vacation, severance, or
5 other benefits owed under the policies and practices of the
6 debtor, or pursuant to the terms of a collective bargaining
7 agreement, for services rendered on and after the date of
8 the commencement of the case, such unpaid obligations
9 shall be deemed necessary costs and expenses of pre-
10 serving, or disposing of, property securing an allowed se-
11 cured claim and shall be recovered even if the trustee has
12 otherwise waived the provisions of this subsection under
13 an agreement with the holder of the allowed secured claim
14 or a successor or predecessor in interest.”.

15 **SEC. 206. PRESERVATION OF JOBS AND BENEFITS.**

16 Chapter 11 of title 11, United States Code, is amend-
17 ed—

18 (1) by inserting before section 1101 the fol-
19 lowing:

20 **“§ 1100. Statement of purpose**

21 “A debtor commencing a case under this chapter
22 shall have as its principal purpose the reorganization of
23 its business to preserve going concern value to the max-
24 imum extent possible through the productive use of its as-
25 sets and the preservation of jobs that will sustain produc-
26 tive economic activity.”;

1 (2) in section 1129—

2 (A) in subsection (a), as amended by sec-
3 tion 104, by adding at the end the following:

4 “(18) The debtor has demonstrated that the re-
5 organization preserves going concern value to the
6 maximum extent possible through the productive use
7 of the assets of the debtor and preserves jobs that
8 sustain productive economic activity.”; and

9 (B) in subsection (c)—

10 (i) by inserting “(1)” after “(c)”; and

11 (ii) by striking the last sentence and
12 inserting the following:

13 “(2) If the requirements of subsections (a) and (b)
14 are met with respect to more than 1 plan, the court shall,
15 in determining which plan to confirm—

16 “(A) consider the extent to which each plan
17 would preserve going concern value through the pro-
18 ductive use of the assets of the debtor and the pres-
19 ervation of jobs that sustain productive economic ac-
20 tivity; and

21 “(B) confirm the plan that better serves such
22 interests.

23 “(3) A plan that incorporates the terms of a settle-
24 ment with a labor organization representing employees of

1 the debtor shall presumptively constitute the plan that sat-
2 isfies this subsection.”; and

3 (3) in the table of sections, by inserting before
4 the item relating to section 1101 the following:

“1100. Statement of purpose.”.

5 **SEC. 207. TERMINATION OF EXCLUSIVITY.**

6 Section 1121(d) of title 11, United States Code, is
7 amended by adding at the end the following:

8 “(3) For purposes of this subsection, cause for reduc-
9 ing the 120-day period or the 180-day period includes—

10 “(A) the filing of a motion pursuant to section
11 1113 seeking rejection of a collective bargaining
12 agreement if a plan based upon an alternative pro-
13 posal by the labor organization is reasonably likely
14 to be confirmed within a reasonable time; and

15 “(B) the proposed filing of a plan by a pro-
16 ponent other than the debtor, which incorporates the
17 terms of a settlement with a labor organization if
18 such plan is reasonably likely to be confirmed within
19 a reasonable time.”.

20 **SEC. 208. CLAIM FOR WITHDRAWAL LIABILITY.**

21 Section 503(b) of title 11, United States Code, as
22 amended by section 103 of this Act, is amended by adding
23 at the end the following:

24 “(11) with respect to withdrawal liability owed
25 to a multiemployer pension plan for a complete or

1 partial withdrawal pursuant to section 4201 of the
2 Employee Retirement Income Security Act of 1974
3 (29 U.S.C. 1381) where such withdrawal occurs on
4 or after the commencement of the case, an amount
5 equal to the amount of vested benefits payable from
6 such pension plan that accrued as a result of em-
7 ployees' services rendered to the debtor during the
8 period beginning on the date of commencement of
9 the case and ending on the date of the withdrawal
10 from the plan.”.

11 **TITLE III—RESTRICTING EXECU-**
12 **TIVE COMPENSATION PRO-**
13 **GRAMS**

14 **SEC. 301. EXECUTIVE COMPENSATION UPON EXIT FROM**
15 **BANKRUPTCY.**

16 Section 1129(a) of title 11, United States Code, is
17 amended—

18 (1) in paragraph (4), by adding at the end the
19 following: “Except for compensation subject to re-
20 view under paragraph (5), payments or other dis-
21 tributions under the plan to or for the benefit of in-
22 siders, senior executive officers, and any of the twen-
23 ty next most highly compensated employees or con-
24 sultants providing services to the debtor, shall not be
25 approved except as part of a program of payments

1 or distributions generally applicable to employees of
2 the debtor, and only to the extent that the court de-
3 termines that such payments are not excessive or
4 disproportionate compared to distributions to the
5 nonmanagement workforce of the debtor.”; and

6 (2) in paragraph (5)—

7 (A) in subparagraph (A)(ii), by striking
8 “and” at the end;

9 (B) in subparagraph (B), by striking the
10 period at the end and inserting “; and”; and

11 (C) by adding at the end the following:

12 “(C) the compensation disclosed pursuant to
13 subparagraph (B) has been approved by, or is sub-
14 ject to the approval of, the court as—

15 “(i) reasonable when compared to individ-
16 uals holding comparable positions at com-
17 parable companies in the same industry; and

18 “(ii) not disproportionate in light of eco-
19 nomic concessions by the nonmanagement work-
20 force of the debtor during the case.”.

21 **SEC. 302. LIMITATIONS ON EXECUTIVE COMPENSATION EN-**
22 **HANCEMENTS.**

23 Section 503(e) of title 11, United States Code, is
24 amended—

1 (1) in paragraph (1), in the matter preceding
2 subparagraph (A)—

3 (A) by inserting “, a senior executive offi-
4 cer, or any of the twenty next most highly com-
5 pensated employees or consultants” after “an
6 insider”;

7 (B) by inserting “or for the payment of
8 performance or incentive compensation, or a
9 bonus of any kind, or other financial returns
10 designed to replace or enhance incentive, stock,
11 or other compensation in effect before the date
12 of the commencement of the case,” after “re-
13 main with the debtor’s business,”; and

14 (C) by inserting “clear and convincing” be-
15 fore “evidence in the record”; and

16 (2) by amending paragraph (3) to read as fol-
17 lows:

18 “(3) other transfers or obligations to or for the
19 benefit of insiders, senior executive officers, man-
20 agers, or consultants providing services to the debt-
21 or, in the absence of a finding by the court, based
22 upon clear and convincing evidence, and without def-
23 erence to the request of the debtor for such pay-
24 ments, that such transfers or obligations are essen-
25 tial to the survival of the business of the debtor or

1 (in the case of a liquidation of some or all of the as-
2 sets of the debtor) essential to the orderly liquida-
3 tion and maximization of value of the assets of the
4 debtor, in either case, because of the essential na-
5 ture of the services provided, and then only to the
6 extent that the court finds such transfers or obliga-
7 tions are reasonable compared to individuals holding
8 comparable positions at comparable companies in
9 the same industry and not disproportionate in light
10 of economic concessions by the nonmanagement
11 workforce of the debtor during the case.”.

12 **SEC. 303. ASSUMPTION OF EXECUTIVE BENEFIT PLANS.**

13 Section 365 of title 11, United States Code, is
14 amended—

15 (1) in subsection (a), by striking “and (d)” and
16 inserting “(d), (q), and (r)”; and

17 (2) by adding at the end the following:

18 “(q) No deferred compensation arrangement for the
19 benefit of insiders, senior executive officers, or any of the
20 twenty next most highly compensated employees of the
21 debtor shall be assumed if a defined benefit plan for em-
22 ployees of the debtor has been terminated pursuant to sec-
23 tion 4041 or 4042 of the Employee Retirement Income
24 Security Act of 1974 (29 U.S.C. 1341, 1342), on or after

1 the date of the commencement of the case or within 180
2 days before the date of the commencement of the case.

3 “(r) No plan, fund, program, or contract to provide
4 retiree benefits for insiders, senior executive officers, or
5 any of the twenty next most highly compensated employees
6 of the debtor shall be assumed if the debtor has obtained
7 relief under subsection (g) or (h) of section 1114 to impose
8 reductions in retiree benefits or under subsection (d) or
9 (e) of section 1113 to impose reductions in the health ben-
10 efits of active employees of the debtor, or reduced or elimi-
11 nated health benefits for active or retired employees within
12 180 days before the date of the commencement of the
13 case.”.

14 **SEC. 304. RECOVERY OF EXECUTIVE COMPENSATION.**

15 (a) IN GENERAL.—Subchapter III of chapter 5 of
16 title 11, United States Code, is amended by inserting after
17 section 562 the following:

18 **“§ 563. Recovery of executive compensation**

19 “(a) If a debtor has obtained relief under section
20 1113(d) or section 1114(g), by which the debtor reduces
21 the cost of its obligations under a collective bargaining
22 agreement or a plan, fund, or program for retiree benefits
23 (as defined in section 1114(a)), the court, in granting re-
24 lief, shall determine the percentage diminution in the value
25 of the obligations when compared to the obligations of the

1 debtor under the collective bargaining agreement, or with
2 respect to retiree benefits, as of the date of the commence-
3 ment of the case under this title before granting such re-
4 lief. In making its determination, the court shall include
5 reductions in benefits, if any, as a result of the termi-
6 nation pursuant to section 4041 or 4042 of the Employee
7 Retirement Income Security Act of 1974 (29 U.S.C. 1341,
8 1342), of a defined benefit plan administered by the debt-
9 or, or for which the debtor is a contributing employer, ef-
10 fective at any time on or after 180 days before the date
11 of the commencement of a case under this title. The court
12 shall not take into account pension benefits paid or pay-
13 able under that Act as a result of any such termination.

14 “(b) If a defined benefit pension plan administered
15 by the debtor, or for which the debtor is a contributing
16 employer, has been terminated pursuant to section 4041
17 or 4042 of the Employee Retirement Income Security Act
18 of 1974 (29 U.S.C. 1341, 1342), effective at any time on
19 or after 180 days before the date of the commencement
20 of a case under this title, but a debtor has not obtained
21 relief under section 1113(d), or section 1114(g), the court,
22 upon motion of a party in interest, shall determine the
23 percentage diminution in the value of benefit obligations
24 when compared to the total benefit liabilities before such
25 termination. The court shall not take into account pension

1 benefits paid or payable under title IV of the Employee
2 Retirement Income Security Act of 1974 (29 U.S.C. 1301
3 et seq.) as a result of any such termination.

4 “(c) Upon the determination of the percentage dimi-
5 nution in value under subsection (a) or (b), the estate shall
6 have a claim for the return of the same percentage of the
7 compensation paid, directly or indirectly (including any
8 transfer to a self-settled trust or similar device, or to a
9 nonqualified deferred compensation plan under section
10 409A(d)(1) of the Internal Revenue Code of 1986) to any
11 officer of the debtor serving as member of the board of
12 directors of the debtor within the year before the date of
13 the commencement of the case, and any individual serving
14 as chairman or lead director of the board of directors at
15 the time of the granting of relief under section 1113 or
16 1114 or, if no such relief has been granted, the termi-
17 nation of the defined benefit plan.

18 “(d) The trustee or a committee appointed pursuant
19 to section 1102 may commence an action to recover such
20 claims, except that if neither the trustee nor such com-
21 mittee commences an action to recover such claim by the
22 first date set for the hearing on the confirmation of plan
23 under section 1129, any party in interest may apply to
24 the court for authority to recover such claim for the ben-

1 efit of the estate. The costs of recovery shall be borne by
2 the estate.

3 “(e) The court shall not award postpetition com-
4 pensation under section 503(c) or otherwise to any person
5 subject to subsection (c) of this section if there is a reason-
6 able likelihood that such compensation is intended to reim-
7 burse or replace compensation recovered by the estate
8 under this section.”.

9 (b) TECHNICAL AND CONFORMING AMENDMENT.—
10 The table of sections for chapter 5 of title 11, United
11 States Code, is amended by inserting after the item relat-
12 ing to section 562 the following:

“563. Recovery of executive compensation.”.

13 **SEC. 305. PREFERENTIAL COMPENSATION TRANSFER.**

14 Section 547 of title 11, United States Code, is
15 amended by adding at the end the following:

16 “(j)(1) The trustee may avoid a transfer—

17 “(A) made—

18 “(i) to or for the benefit of an insider (in-
19 cluding an obligation incurred for the benefit of
20 an insider under an employment contract) made
21 in anticipation of bankruptcy; or

22 “(ii) in anticipation of bankruptcy to a
23 consultant who is formerly an insider and who
24 is retained to provide services to an entity that
25 becomes a debtor (including an obligation under

1 a contract to provide services to such entity or
2 to a debtor); and

3 “(B) made or incurred on or within 1 year be-
4 fore the filing of the petition.

5 “(2) No provision of subsection (c) shall constitute
6 a defense against the recovery of a transfer described in
7 paragraph (1).

8 “(3) The trustee or a committee appointed pursuant
9 to section 1102 may commence an action to recover a
10 transfer described in paragraph (1), except that, if neither
11 the trustee nor such committee commences an action to
12 recover the transfer by the time of the commencement of
13 a hearing on the confirmation of a plan under section
14 1129, any party in interest may apply to the court for
15 authority to recover the claims for the benefit of the es-
16 tate. The costs of recovery shall be borne by the estate.”.

17 **TITLE IV—OTHER PROVISIONS**

18 **SEC. 401. UNION PROOF OF CLAIM.**

19 Section 501(a) of title 11, United States Code, is
20 amended by inserting “, including a labor organization,”
21 after “A creditor”.

22 **SEC. 402. EXCEPTION FROM AUTOMATIC STAY.**

23 Section 362(b) of title 11, United States Code, is
24 amended—

1 (1) in paragraph (27), by striking “and” at the
2 end;

3 (2) in paragraph (28), by striking the period at
4 the end and inserting “; and”; and

5 (3) by inserting after paragraph (28) the fol-
6 lowing:

7 “(29) of the commencement or continuation of
8 a grievance, arbitration, or similar dispute resolution
9 proceeding established by a collective bargaining
10 agreement that was or could have been commenced
11 against the debtor before the filing of a case under
12 this title, or the payment or enforcement of an
13 award or settlement under such proceeding.”.

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