

116TH CONGRESS
2D SESSION

S. 4089

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

IN THE SENATE OF THE UNITED STATES

JUNE 25, 2020

Mr. DURBIN (for himself, Mr. WHITEHOUSE, Ms. KLOBUCHAR, Ms. HARRIS, Mr. BROWN, Mr. SCHATZ, and Mr. MERKLEY) 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 2020”.

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 and contributions to employee benefit plans.
- 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. Prohibition against special compensation payments.
- Sec. 304. Assumption of executive benefit plans.
- Sec. 305. Recovery of executive compensation.
- Sec. 306. Preferential compensation transfer.

TITLE IV—OTHER PROVISIONS

- Sec. 401. Union proof of claim.
- Sec. 402. Exception from automatic stay.
- Sec. 403. Effect on collective bargaining agreements under the Railway Labor Act.

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 due to the impact of the COVID–19 pandemic. As
 6 the use of bankruptcy has expanded, job preserva-
 7 tion and retirement security are placed at greater
 8 risk.

(2) Laws enacted to improve recoveries for employees and retirees and limit their losses in bankruptcy cases have not kept pace with the increasing and broader use of bankruptcy by businesses in all sectors of the economy. However, while protections for employees and retirees in bankruptcy cases have eroded, management compensation plans devised for those in charge of troubled businesses have become more prevalent and are escaping adequate scrutiny.

(3) Changes in the law regarding these matters are urgently needed as bankruptcy is used to address increasingly more complex and diverse conditions affecting troubled businesses and industries.

TITLE I—IMPROVING RECOVERIES FOR EMPLOYEES AND RETIREES

SEC. 101. INCREASED WAGE PRIORITY.

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

(1) in paragraph (4)—

(A) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(B) in the matter preceding clause (i), as so redesignated, by inserting “(A)” before “Fourth”;

1 (C) in subparagraph (A), as so designated,
2 in the matter preceding clause (i), as so rededesignated—
3

4 (i) by striking “\$10,000” and inserting “\$20,000”;

5 (ii) by striking “within 180 days”;
6 and
7

8 (iii) by striking “or the date of the
9 cessation of the debtor’s business, whichever
10 occurs first,”; and

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

12 “(B) Severance pay described in subparagraph
13 (A)(i) shall be deemed earned in full upon the layoff
14 or termination of employment of the individual to
15 whom the severance is owed.”;

16 (2) in paragraph (5)—

17 (A) in subparagraph (A)—

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

19 (ii) by striking “or the date of the
20 cessation of the debtor’s business, whichever
21 occurs first”; and

22 (B) by striking subparagraph (B) and inserting the following:
23

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

4 **SEC. 102. CLAIM FOR STOCK VALUE LOSSES IN DEFINED**
 5 **CONTRIBUTION PLANS.**

6 Section 101(5) of title 11, United States Code, is
 7 amended—

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

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

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

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

15 “(i) the equity securities are held in a
 16 defined contribution plan (within the
 17 meaning of section 3(34) of the Employee
 18 Retirement Income Security Act of 1974
 19 (29 U.S.C. 1002(34))) for the benefit of
 20 an individual who is not an insider, a sen-
 21 ior executive officer, or any of the 20 high-
 22 est compensated employees of the debtor
 23 who are not insiders or senior executive of-
 24 ficers;

“(ii) the equity securities were attributable to either employer contributions by the debtor or an affiliate of the debtor, or elective deferrals (within the meaning of section 402(g) of the Internal Revenue Code of 1986), and any earnings thereon; and

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

SEC. 103. PRIORITY FOR SEVERANCE PAY AND CONTRIBUTIONS TO EMPLOYEE BENEFIT PLANS.

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

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

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

(3) by adding at the end the following:

“(10) severance pay owed to employees of the debtor (other than to an insider of the debtor, a senior executive officer of the debtor, the 20 highest

1 compensated employees of the debtor who are not in-
 2 siders or senior executive officers, any department or
 3 division manager of the debtor, or any consultant
 4 providing services to the debtor), under a plan, pro-
 5 gram, or policy generally applicable to employees of
 6 the debtor (but not under an individual contract of
 7 employment), or owed pursuant to a collective bar-
 8 gaining agreement, for layoff or termination on or
 9 after the date of the filing of the petition, which pay
 10 shall be deemed earned in full upon such layoff or
 11 termination of employment; and

12 “(11) any contribution to an employee benefit
 13 plan that is due on or after the date of the filing of
 14 the petition; and”.

15 **SEC. 104. FINANCIAL RETURNS FOR EMPLOYEES AND RE-**
 16 **TIREES.**

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

19 (1) by striking paragraph (13) and inserting
 20 the following:

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

23 “(A) provides for the continuation after
 24 the effective date of the plan of payment of all
 25 retiree benefits at the level established pursuant

1 to subsection (e)(1)(B) or (g) of section 1114
2 at any time before the date of confirmation of
3 the plan, for the duration of the period for
4 which the debtor has obligated itself to provide
5 such benefits, or if no modifications are made
6 before confirmation of the plan, the continu-
7 ation of all such retiree benefits maintained or
8 established in whole or in part by the debtor be-
9 fore the date of the filing of the petition; and

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

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

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

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

2 Section 503(b)(1)(A)(ii) of title 11, United States
 3 Code is amended by inserting “any back pay, civil penalty,
 4 or damages for a violation of any Federal or State labor
 5 and employment law, including the Worker Adjustment
 6 and Retraining Notification Act (29 U.S.C. 2101 et seq.)
 7 and any comparable State law,” before “wages and bene-
 8 fits”.

9 **TITLE II—REDUCING EMPLOY-**
 10 **EES’ AND RETIREES’ LOSSES**

11 **SEC. 201. REJECTION OF COLLECTIVE BARGAINING AGREE-**
 12 **MENTS.**

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

16 “(a) The debtor in possession, or the trustee if one
 17 has been appointed under this chapter, other than as pro-
 18 vided in section 103(m) for collective bargaining agree-
 19 ments covered by the Railway Labor Act (45 U.S.C. 151
 20 et seq.), may reject a collective bargaining agreement only
 21 in accordance with this section. In this section, a reference
 22 to the trustee includes the debtor in possession.

23 “(b) No provision of this title shall be construed to
 24 permit the trustee to unilaterally terminate or alter any
 25 provision of a collective bargaining agreement before com-
 26 plying with this section. The trustee shall timely pay all

1 monetary obligations arising under the terms of the collec-
2 tive bargaining agreement. Any such payment required to
3 be made before a plan confirmed under section 1129 is
4 effective has the status of an allowed administrative ex-
5 pense under section 503.

6 “(c)(1) If the trustee seeks modification of a collec-
7 tive bargaining agreement, the trustee shall provide notice
8 to the labor organization representing the employees cov-
9 ered by the collective bargaining agreement that modifica-
10 tions are being proposed under this section, and shall
11 promptly provide an initial proposal for modifications to
12 the collective bargaining agreement. Thereafter, the trust-
13 ee shall confer in good faith with the labor organization,
14 at reasonable times and for a reasonable period in light
15 of the complexity of the case, in attempting to reach mutu-
16 ally acceptable modifications of the collective bargaining
17 agreement.

18 “(2) The initial proposal and subsequent proposals
19 by the trustee for modification of a collective bargaining
20 agreement shall be based upon a business plan for the re-
21 organization of the debtor, and shall reflect the most com-
22 plete and reliable information available. The trustee shall
23 provide to the labor organization all information that is
24 relevant for negotiations. The court may enter a protective
25 order to prevent the disclosure of information if disclosure

1 could compromise the position of the debtor with respect
2 to the competitors in the industry of the debtor, subject
3 to the needs of the labor organization to evaluate the pro-
4 posals of the trustee and any application for rejection of
5 the collective bargaining agreement or for interim relief
6 pursuant to this section.

7 “(3) In consideration of Federal policy encouraging
8 the practice and process of collective bargaining and in
9 recognition of the bargained-for expectations of the em-
10 ployees covered by the collective bargaining agreement,
11 modifications proposed by the trustee—

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

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

1 ther financial reorganization, of the debtor (or any
2 successor to the debtor) in the short term; and

3 “(C) shall not be disproportionate or overly bur-
4 den the employees covered by the collective bar-
5 gaining agreement, either in the amount of the cost
6 savings sought from such employees or the nature of
7 the modifications.

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

23 “(2) In consideration of Federal policy encouraging
24 the practice and process of collective bargaining and in
25 recognition of the bargained-for expectations of the em-

1 ployees covered by the collective bargaining agreement, the
2 court may grant a motion seeking rejection of a collective
3 bargaining agreement only if, based on clear and con-
4 vincing evidence—

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

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

11 “(C) the court finds that further negotiations
12 regarding the proposal of the trustee or an alter-
13 native proposal by the labor organization are not
14 likely to produce an agreement;

15 “(D) the court finds that implementation of the
16 proposal of the trustee shall not—

17 “(i) cause a material diminution in the
18 purchasing power of the employees covered by
19 the collective bargaining agreement;

20 “(ii) adversely affect the ability of the
21 debtor to retain an experienced and qualified
22 workforce; or

23 “(iii) impair the labor relations of the
24 debtor such that the ability to achieve a feasible
25 reorganization would be compromised; and

1 “(E) the court concludes that rejection of the
2 collective bargaining agreement and immediate im-
3 plementation of the proposal of the trustee is essen-
4 tial to permit the debtor to exit bankruptcy, such
5 that confirmation of a plan of reorganization is not
6 likely to be followed by liquidation, or the need for
7 further financial reorganization, of the debtor (or
8 any successor to the debtor) in the short term.

9 “(3) If, during the bankruptcy, the trustee has imple-
10 mented a program of incentive pay, bonuses, or other fi-
11 nancial returns for an insider of the debtor, a senior exec-
12 utive officer of the debtor, any of the 20 highest com-
13 pensated employees of the debtor who are not insiders or
14 senior executive officers, any department or division man-
15 ager of the debtor, or any consultant providing services
16 to the debtor, or such a program was implemented within
17 180 days before the date of the filing of the petition, the
18 court shall presume that the trustee has failed to satisfy
19 the requirements of subsection (c)(3)(C).

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

1 “(5) At any time after the date on which an order
2 rejecting a collective bargaining agreement is entered, or
3 in the case of a collective bargaining agreement entered
4 into between the trustee and the labor organization pro-
5 viding mutually satisfactory modifications, at any time
6 after that collective bargaining agreement has been en-
7 tered into, the labor organization may apply to the court
8 for an order seeking an increase in the level of wages or
9 benefits, or relief from working conditions, based upon
10 changed circumstances. The court shall grant the request
11 only if the increase or other relief is not inconsistent with
12 the standard set forth in paragraph (2)(E).

13 “(e) During a period during which a collective bar-
14 gaining agreement at issue under this section continues
15 in effect and a motion for rejection of the collective bar-
16 gaining agreement has been filed, if essential to the con-
17 tinuation of the business of the debtor or in order to avoid
18 irreparable damage to the estate, the court, after notice
19 and a hearing, may authorize the trustee to implement
20 interim changes in the terms, conditions, wages, benefits,
21 or work rules provided by the collective bargaining agree-
22 ment. Any hearing under this subsection shall be sched-
23 uled in accordance with the needs of the trustee. The im-
24 plementation of such interim changes shall not render the

1 application for rejection moot and may be authorized for
2 not more than 14 days in total.

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

7 “(2) Notwithstanding paragraph (1), solely for pur-
8 poses of determining and allowing a claim arising from
9 the rejection of a collective bargaining agreement, rejec-
10 tion shall be treated as rejection of an executory contract
11 under section 365(g) and shall be allowed or disallowed
12 in accordance with section 502(g)(1). No claim for rejec-
13 tion damages shall be limited by section 502(b)(7). Eco-
14 nomic self-help by a labor organization shall be permitted
15 upon a court order granting a motion to reject a collective
16 bargaining agreement under subsection (d) or pursuant to
17 subsection (e), and no provision of this title or of any other
18 provision of Federal or State law may be construed to the
19 contrary.

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

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

1 **SEC. 202. PAYMENT OF INSURANCE BENEFITS TO RETIRED**
2 **EMPLOYEES.**

3 Section 1114 of title 11, United States Code, is
4 amended—

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

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

12 (3) by striking subsection (f) and inserting the
13 following:

14 “(f)(1) If a trustee seeks modification of retiree bene-
15 fits, the trustee shall provide a notice to the authorized
16 representative that modifications are being proposed pur-
17 suant to this section, and shall promptly provide an initial
18 proposal. Thereafter, the trustee shall confer in good faith
19 with the authorized representative at reasonable times and
20 for a reasonable period in light of the complexity of the
21 case in attempting to reach mutually satisfactory modi-
22 fications.

23 “(2) The initial proposal and subsequent proposals
24 by the trustee shall be based upon a business plan for the
25 reorganization of the debtor and shall reflect the most
26 complete and reliable information available. The trustee

1 shall provide to the authorized representative all informa-
2 tion that is relevant for the negotiations. The court may
3 enter a protective order to prevent the disclosure of infor-
4 mation if disclosure could compromise the position of the
5 debtor with respect to the competitors in the industry of
6 the debtor, subject to the needs of the authorized rep-
7 resentative to evaluate the proposals of the trustee and
8 an application pursuant to subsection (g) or (h).

9 “(3) Modifications proposed by the trustee—

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

14 “(B) shall be limited to modifications that are
15 designed to achieve a specified aggregate financial
16 contribution for the retiree group represented by the
17 authorized representative (taking into consideration
18 any cost savings implemented within the 12-month
19 period before the date of filing of the petition with
20 respect to the retiree group), and shall be no more
21 than the minimum savings essential to permit the
22 debtor to exit bankruptcy, such that confirmation of
23 a plan of reorganization is not likely to be followed
24 by the liquidation, or the need for further financial

1 reorganization, of the debtor (or any successor to
2 the debtor) in the short term; and

3 “(C) shall not be disproportionate or overly bur-
4 den the retiree group, either in the amount of the
5 cost savings sought from such group or the nature
6 of the modifications.”;

7 (4) in subsection (g)—

8 (A) by striking the subsection designation
9 and all that follows through the semicolon at
10 the end of paragraph (3) and inserting the fol-
11 lowing:

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

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

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

6 “(B) the court has considered alternative pro-
7 posals by the authorized representative and has de-
8 termined that such proposals do not meet the re-
9 quirements of subsection (f)(3)(B);

10 “(C) the court finds that further negotiations
11 regarding the proposal of the trustee or an alter-
12 native proposal by the authorized representative are
13 not likely to produce a mutually satisfactory agree-
14 ment;

15 “(D) the court finds that implementation of the
16 proposal shall not cause irreparable harm to the af-
17 fected retirees; and

18 “(E) the court concludes that an order granting
19 the motion and immediate implementation of the
20 proposal of the trustee is essential to permit the
21 debtor to exit bankruptcy, such that confirmation of
22 a plan of reorganization is not likely to be followed
23 by liquidation, or the need for further financial reor-
24 ganization, of the debtor (or a successor to the debt-
25 or) in the short term.

1 “(3) If, during the bankruptcy, a trustee has imple-
 2 mented a program of incentive pay, bonuses, or other fi-
 3 nancial returns for insiders of the debtor, senior executive
 4 officers of the debtor, the 20 highest compensated employ-
 5 ees of the debtor who are not insiders or senior executive
 6 officers, any department or division managers of the debt-
 7 or, or any consultants providing services to the debtor, or
 8 such a program was implemented within 180 days before
 9 the date of the filing of the petition, the court shall pre-
 10 sume that the trustee has failed to satisfy the require-
 11 ments of subsection (f)(3)(C).”; and

12 (B) in the matter following paragraph

13 (3)—

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

16 “(4) In no case”; and

17 (ii) by striking “is consistent with the
 18 standard set forth in paragraph (3)” and
 19 inserting “assures that all creditors, the
 20 debtor, and all of the affected parties are
 21 treated fairly and equitably, and is clearly
 22 favored by the balance of the equities”;

23 (5) in subsection (h)(1), by inserting “for a pe-
 24 riod of not longer than 14 days” before the period;
 25 and

1 (6) by striking subsection (k) and redesignating
 2 subsections (l) and (m) as subsections (k) and (l),
 3 respectively.

4 **SEC. 203. PROTECTION OF EMPLOYEE BENEFITS IN A SALE**
 5 **OF ASSETS.**

6 (a) REQUIREMENT TO PRESERVE JOBS AND MAIN-
 7 TAIN TERMS AND CONDITIONS OF EMPLOYMENT.—Sec-
 8 tion 363 of title 11, United States Code, is amended by
 9 adding at the end the following:

10 “(q)(1) In approving a sale or lease of property of
 11 the estate under this section or a plan under chapter 11,
 12 the court shall give substantial weight to the extent to
 13 which a prospective purchaser or lessee of the property
 14 will—

15 “(A) preserve the jobs of the employees of the
 16 debtor;

17 “(B) maintain the terms and conditions of em-
 18 ployment of the employees of the debtor; and

19 “(C) assume or match the pension and health
 20 benefit obligations of the debtor to the retirees of
 21 the debtor.

22 “(2) If there are two or more offers to purchase or
 23 lease property of the estate under this section or a plan
 24 under chapter 11, the court shall approve the offer of the
 25 prospective purchaser or lessee that will best carry out the

1 actions described in subparagraphs (A) through (C) of
 2 paragraph (1).”.

3 (b) CHAPTER 11 PLANS.—Section 1129(a) of title
 4 11, United States Code is amended by adding at the end
 5 the following:

6 “(17) If the plan provides for the sale of all or
 7 substantially all of the property of the estate, the
 8 plan requires the purchaser of the sale to carry out
 9 the actions described in subparagraphs (A) through
 10 (C) of section 363(q)(1).”.

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

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

14 “(l) The court shall allow a claim asserted by an ac-
 15 tive or retired participant, or by a labor organization rep-
 16 resenting such participants, in a defined benefit plan ter-
 17 minated under section 4041 or 4042 of the Employee Re-
 18 tirement Income Security Act of 1974 (29 U.S.C. 1341,
 19 1342), for any shortfall in pension benefits accrued as of
 20 the effective date of the termination of such pension plan
 21 as a result of the termination of the plan and limitations
 22 upon the payment of benefits imposed pursuant to section
 23 4022 of that Act (29 U.S.C. 1342), notwithstanding any
 24 claim asserted and collected by the Pension Benefit Guar-
 25 anty Corporation with respect to such termination.

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

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

11 Section 506(c) of title 11, United States Code, is
 12 amended—

13 (1) by adding “(1)” after “(c)”; and

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

15 “(2) If one or more employees of the debtor have not
 16 received wages, accrued vacation, severance, or any other
 17 compensation owed under a plan, program, policy or prac-
 18 tice of the debtor, or pursuant to the terms of a collective
 19 bargaining agreement, for services rendered on or after
 20 the date of the commencement of the case, or the debtor
 21 has not made a contribution due under an employee ben-
 22 efit plan on or after the date of the commencement of the
 23 case, such unpaid obligations shall be deemed reasonable,
 24 necessary costs and expenses of preserving, or disposing
 25 of, property securing an allowed secured claim and benefit-

1 ting the holder of the allowed secured claim, and shall be
 2 recovered by the trustee for payment to the employees or
 3 the employee benefit plan, as applicable, even if the trust-
 4 ee, or a successor or predecessor in interest has otherwise
 5 waived the provisions of this subsection under an agree-
 6 ment with the holder of the allowed secured claim or a
 7 successor or predecessor in interest.”.

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

9 Chapter 11 of title 11, United States Code, is amend-
 10 ed—

11 (1) by inserting before section 1101 the fol-
 12 lowing:

13 **“§ 1100. Statement of purpose**

14 “A debtor commencing a case under this chapter
 15 shall have as its principal purpose the reorganization of
 16 its business to preserve going concern value to the max-
 17 imum extent possible through the productive use of its as-
 18 sets and the preservation of jobs that will sustain produc-
 19 tive economic activity.”;

20 (2) in section 1129—

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

23 “(18) The debtor has demonstrated that the re-
 24 organization preserves going concern value to the
 25 maximum extent possible through the productive use

1 of the assets of the debtor and preserves jobs that
 2 sustain productive economic activity.”; and

3 (B) in subsection (c)—

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

5 (ii) by striking the last sentence and
 6 inserting the following:

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

10 “(A) consider the extent to which each plan
 11 would preserve going concern value through the pro-
 12 ductive use of the assets of the debtor and the pres-
 13 ervation of jobs that sustain productive economic ac-
 14 tivity; and

15 “(B) confirm the plan that better serves such
 16 interests.

17 “(3) A plan that incorporates the terms of a settle-
 18 ment with a labor organization representing employees of
 19 the debtor shall presumptively constitute the plan that sat-
 20 isfies this subsection.”; and

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

“1100. Statement of purpose.”.

23 **SEC. 207. TERMINATION OF EXCLUSIVITY.**

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

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

3 “(A) the filing of a motion pursuant to section
 4 1113 seeking rejection of a collective bargaining
 5 agreement if a plan based upon an alternative pro-
 6 posal by the labor organization is reasonably likely
 7 to be confirmed within a reasonable time; and

8 “(B) the proposed filing of a plan by a pro-
 9 ponent other than the debtor, which incorporates the
 10 terms of a settlement with a labor organization if
 11 such plan is reasonably likely to be confirmed within
 12 a reasonable time.”.

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

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

17 “(12) with respect to withdrawal liability owed
 18 to a multiemployer pension plan for a complete or
 19 partial withdrawal pursuant to section 4201 of the
 20 Employee Retirement Income Security Act of 1974
 21 (29 U.S.C. 1381) where such withdrawal occurs on
 22 or after the commencement of the case, an amount
 23 equal to the total benefits payable from such pension
 24 plan that accrued as a result of employees’ services
 25 rendered to the debtor during the period beginning

1 on the date of commencement of the case and end-
 2 ing on the date of the withdrawal from the plan.”.

3 **TITLE III—RESTRICTING EXECU-**
 4 **TIVE COMPENSATION PRO-**
 5 **GRAMS**

6 **SEC. 301. EXECUTIVE COMPENSATION UPON EXIT FROM**
 7 **BANKRUPTCY.**

8 Section 1129(a) of title 11, United States Code, is
 9 amended—

10 (1) in paragraph (4)—

11 (A) by adding “(A)” after “(4)”;

12 (B) in subparagraph (A), as so designated,
 13 by striking “Any payment” and inserting “Sub-
 14 ject to subparagraph (B), any payment”; and

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

16 “(B)(i) Subject to clause (ii), the plan does not
 17 provide for payments or other distributions to, or for
 18 the benefit of, an insider of the debtor, a senior ex-
 19 ecutive officer of the debtor, any of the 20 highest
 20 compensated employees of the debtor who are not in-
 21 siders or senior executive officers, any department or
 22 division manager of the debtor, or any consultant
 23 providing services to the debtor, unless—

1 “(I) the payments or other distributions
2 are part of a program that is generally applica-
3 ble to all full-time employees of the debtor; and

4 “(II) the payments or distributions do not
5 exceed the compensation limits established in
6 section 503(c)(1) in comparison to the non-
7 management workforce of the debtor.

8 “(ii) The requirement under clause (i) shall not
9 apply to the compensation described in paragraph
10 (5)(C).”;

11 (2) in paragraph (5)—

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

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

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

17 “(C) the compensation disclosed under subpara-
18 graph (B) has been approved by, or is subject to the
19 approval of, the court as—

20 “(i) reasonable when compared to individ-
21 uals holding comparable positions at com-
22 parable companies in the same industry as the
23 debtor;

24 “(ii) not more than the amount cor-
25 responding to the 50th percentile of the com-

1 pensation of the individuals described in clause
 2 (i); and
 3 “(iii) not excessive or disproportionate in
 4 light of economic losses of the nonmanagement
 5 workforce of the debtor.”.

6 **SEC. 302. LIMITATIONS ON EXECUTIVE COMPENSATION EN-**
 7 **HANCEMENTS.**

8 Section 503(c) of title 11, United States Code, is
 9 amended—

10 (1) in the matter preceding paragraph (1), by
 11 inserting “and subject to section 363(b)(3)” after
 12 “subsection (b)”;

13 (2) in paragraph (1)—

14 (A) in the matter preceding subparagraph

15 (A)—

16 (i) by inserting “, a senior executive
 17 officer of the debtor, any the 20 highest
 18 compensated employees of the debtor who
 19 are not insiders or senior executive officers,
 20 any department or division manager of the
 21 debtor, or any consultant providing serv-
 22 ices to the debtor” before “for the pur-
 23 pose”; and

24 (ii) by inserting “or for the payment
 25 of performance or incentive compensation,

1 or a bonus of any kind, or other financial
 2 returns designed to replace or enhance in-
 3 centive, stock, or other compensation in ef-
 4 fect before the date of the commencement
 5 of the case,” after “remain with the debt-
 6 or’s business,”;

7 (B) by amending subparagraph (A) to read
 8 as follows:

9 “(A) the transfer or obligation is part of a
 10 program that is generally applicable to all full-
 11 time employees of the debtor; and”;

12 (C) by striking subparagraph (B);

13 (D) by redesignating subparagraph (C) as
 14 subparagraph (B);

15 (E) in subparagraph (B), as so redesign-
 16 nated—

17 (i) in clause (i), by striking “10” and
 18 inserting “2”; and

19 (ii) in clause (ii)—

20 (I) by striking “25” and insert-
 21 ing “10”; and

22 (II) by striking “insider” and in-
 23 serting “person”;

24 (3) in paragraph (2)—

1 (A) in the matter preceding subparagraph
2 (A), by inserting “, a senior executive officer of
3 the debtor, any of the 20 highest compensated
4 employees of the debtor who are not insiders or
5 senior executive officers, any department or di-
6 vision manager of the debtor, or any consultant
7 providing services to the debtor,” before “, un-
8 less”; and

9 (B) in subparagraph (B), by striking “10”
10 and inserting “2”; and

11 (4) by amending paragraph (3) to read as fol-
12 lows:

13 “(3) other transfers or obligations to, or for the
14 benefit of, an insider of the debtor, a senior execu-
15 tive officer of the debtor, the 20 highest com-
16 pensated employees of the debtor who are not insid-
17 ers or senior executive officers, any department or
18 division manager of the debtor, or any consultant
19 providing services to the debtor that are outside of
20 the ordinary course of business, except as part of a
21 plan of reorganization and subject to the approval of
22 the court under paragraphs (4) and (5) of section
23 1129(a).”.

1 **SEC. 303. PROHIBITION AGAINST SPECIAL COMPENSATION**
2 **PAYMENTS.**

3 Section 363 of title 11, United States Code, is
4 amended—

5 (1) in subsection (b), by adding at the end the
6 following:

7 “(3) No plan, program, or other transfer or obliga-
8 tion to, or for the benefit of, an insider of the debtor, a
9 senior executive officer of the debtor, the 20 highest com-
10 pensated employees of the debtor who are not insiders or
11 senior executive officers, any department or division man-
12 ager of the debtor, or any consultant providing services
13 to the debtor shall be approved if the debtor has, on or
14 after the date that is 1 year before the date of the filing
15 of the petition—

16 “(A) discontinued any plan, program, policy, or
17 practice of paying severance pay to the nonmanage-
18 ment workforce of the debtor; or

19 “(B) modified any plan, program, policy, or
20 practice described in subparagraph (A) in order to
21 reduce benefits under the plan, program, policy, or
22 practice.”; and

23 (2) in subsection (c)—

24 (A) in paragraph (1), by striking “If the
25 business” and inserting “Except as provided in
26 paragraph (5), if the business”; and

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

2 “(5) In the case of a transaction that is a transfer
3 or obligation described in paragraphs (1) through (3) of
4 section 503(c), the trustee shall obtain the prior approval
5 of the court after notice and an opportunity for a hear-
6 ing.”.

7 **SEC. 304. ASSUMPTION OF EXECUTIVE BENEFIT PLANS.**

8 Section 365 of title 11, United States Code, is
9 amended—

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

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

13 “(q) No deferred compensation arrangement for the
14 benefit of an insider of the debtor, a senior executive offi-
15 cer of the debtor, or any of the 20 highest compensated
16 employees of the debtor who are not insiders or senior ex-
17 ecutive officers shall be assumed if a defined benefit plan
18 for employees of the debtor has been terminated pursuant
19 to section 4041 or 4042 of the Employee Retirement In-
20 come Security Act of 1974 (29 U.S.C. 1341, 1342), on
21 or after the date that is 1 year before the date of the com-
22 mencement of the case.

23 “(r) No plan, fund, program, or contract to provide
24 retiree benefits for insiders of the debtor, senior executive
25 officers of the debtor, or the 20 highest compensated em-

1 ployees of the debtor who are not insiders or senior execu-
 2 tive officers shall be assumed if the debtor has obtained
 3 relief under subsection (g) or (h) of section 1114 to impose
 4 reductions in retiree benefits or under subsection (d) or
 5 (e) of section 1113 to impose reductions in the health ben-
 6 efits of active employees of the debtor, or has otherwise
 7 reduced or eliminated health benefits for employees or re-
 8 tirees of the debtor on or after the date that is 1 year
 9 before the date of the commencement of the case.”.

10 **SEC. 305. RECOVERY OF EXECUTIVE COMPENSATION.**

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

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

15 “(a) If a debtor has obtained relief under section
 16 1113(d) or section 1114(g), by which the debtor reduces
 17 the cost of its obligations under a collective bargaining
 18 agreement or a plan, fund, or program for retiree benefits
 19 (as defined in section 1114(a)), the court, in granting re-
 20 lief, shall determine the percentage diminution in the value
 21 of the obligations when compared to the obligations of the
 22 debtor under the collective bargaining agreement, or with
 23 respect to retiree benefits, as of the date of the commence-
 24 ment of the case under this title before granting such re-
 25 lief. In making its determination, the court shall include

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

10 “(b) If a defined benefit pension plan administered
11 by the debtor, or for which the debtor is a contributing
12 employer, has been terminated pursuant to section 4041
13 or 4042 of the Employee Retirement Income Security Act
14 of 1974 (29 U.S.C. 1341, 1342), effective at any time on
15 or after 180 days before the date of the commencement
16 of a case under this title, but a debtor has not obtained
17 relief under section 1113(d), or section 1114(g), the court,
18 upon motion of a party in interest, shall determine the
19 percentage diminution in the value of benefit obligations
20 when compared to the total benefit liabilities before such
21 termination. The court shall not take into account pension
22 benefits paid or payable under title IV of the Employee
23 Retirement Income Security Act of 1974 (29 U.S.C. 1301
24 et seq.) as a result of any such termination.

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

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

24 “(e) The court shall not award postpetition com-
25 pensation under section 503(c) or otherwise to any person

1 subject to subsection (c) of this section if there is a reason-
 2 able likelihood that such compensation is intended to reim-
 3 burse or replace compensation recovered by the estate
 4 under this section.”.

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

“563. Recovery of executive compensation.”.

9 **SEC. 306. PREFERENTIAL COMPENSATION TRANSFER.**

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

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

13 “(A) made—

14 “(i) to, or for the benefit of, an insider of
 15 the debtor (including an obligation incurred for
 16 the benefit of an insider under an employment
 17 contract), a senior executive officer of the debt-
 18 or, the 20 highest compensated employees of
 19 the debtor who are not insiders or senior execu-
 20 tive officers, any department or division man-
 21 ager of the debtor, or any consultant providing
 22 services to the debtor made in anticipation of
 23 bankruptcy; or

24 “(ii) in anticipation of bankruptcy to a
 25 consultant who is formerly an insider and who

1 is retained to provide services to an entity that
 2 becomes a debtor (including an obligation under
 3 a contract to provide services to such entity or
 4 to a debtor); and

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

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

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

19 **TITLE IV—OTHER PROVISIONS**

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

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

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

2 Section 362(b) of title 11, United States Code, is
3 amended—

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

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

8 (3) by inserting after paragraph (28) the fol-
9 lowing:

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

17 **SEC. 403. EFFECT ON COLLECTIVE BARGAINING AGREE-**
18 **MENTS UNDER THE RAILWAY LABOR ACT.**

19 Section 103 of title 11, United States Code, is
20 amended by adding at the end the following:

21 “(m) Notwithstanding sections 365, 1113, or 1114,
22 neither the court nor the trustee may change the wages,
23 working conditions, or retirement benefits of an employee
24 or a retiree of the debtor established by a collective bar-
25 gaining agreement that is subject to the Railway Labor

1 Act (45 U.S.C. 151 et seq.), except in accordance with
2 section 6 of that Act (45 U.S.C. 156).”.

○