Puerto Rico Electric Power Authority
Public-Private Partnerships Authority Labor Transformation White Paper

February 1, 2019

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I. EXECUTIVE SUMMARY

Puerto Rico desires to create Public-Private Partnerships with Contractors (such partnership is referred to in this document as a "Partnership Contract") that will transform the existing electric power system of Puerto Rico Electric Power Authority ("PREPA") into a system that is financially viable, prioritizes consumers, and provides efficient, cost-effective, and reliable power. Accordingly, Puerto Rico enacted Act 120-2018, the Puerto Rico Electric Power System Transformation Act, to authorize the "legal framework for the sale, disposition, and/or transfer of the assets, operations, functions, and services of" PREPA and establish and amend legislation as needed to facilitate such sale, disposition, and/or transfer. (Act 120-2018, Preamble.)

Part II below explains the statutory landscape affecting this transformation and its impact on current PREPA employees, including existing requirements applicable to Contractors under the statute governing PREPA's transformation and certain generally applicable statutes. Part III below explains the labor relations landscape affecting this transformation, including the existing collective bargaining agreements and their potential impact on this transformation.

II. STATUTORY LANDSCAPE AFFECTING PREPA'S TRANSFORMATION

A. Act 120-2018, Puerto Rico Electric Power System Transformation Act

Act 120-2018 establishes the legal framework for the sale, disposition, and/or transfer of PREPA assets, operations, functions, and services. Included in this framework are certain protections described in this Section II.A. for current PREPA employees.[1] Act 120-2018 also provides that all provisions of Act 29-2009, the Public-Private Partnership Act, shall apply to any Public-Private Partnership for a function, service, or facility of PREPA or to the sale of any PREPA assets, except as otherwise specified in Act 120-2018. (Act 120-2018, sec. 4.)

Act 120-2018 requires that the Government of Puerto Rico ensure that no transaction under Act 120-2018 be the basis for dismissing current PREPA employees. Accordingly, any current PREPA employees who are not assumed or hired by a Contractor must be transitioned by the Government to other Government positions.

Generally, though, neither Act 120-2018 nor Act 29-2009 require a Contractor to assume or hire current PREPA employees or assume any of PREPA's obligations with respect to such employees (other than the obligation to continue to make employer contributions to PREPA's pension plan

[1] Act 120-2018's Statement of Motives explains that Act 120-2018 provides that regular PREPA employees who are not selected to work for the Contractor shall retain their positions or be transferred to other positions within PREPA and other government entities. In addition, it provides that said employees shall keep all their vested rights in accordance with the laws, rules, collective bargaining agreements, and regulations applicable to them, thereby guaranteeing that no regular PREPA employee shall lose his job or his benefits as result of PREPA Transactions. It also states that the existing legal structure that applies for the establishment of Public-Private Partnerships requires that Contractors give priority to PREPA employees in their recruitment process.

for those employees assumed or hired, as explained below), unless the Contractor otherwise agrees.[2] But under Act 29-2009, one of the criteria to be used to evaluate Contractor proposals is "[t]he commitments or the priorities that the contractor is willing to establish in order to hire employees from the partnering government entity affected by the partnership, as well as the risk to be assumed by the contractor." (Act 29-2009 Sec. 9(c)(xi).) And, given the interest in ensuring a smooth labor transition with no interruption in the generation or distribution of electric power, Contractors may want to hire current PREPA employees who have the existing skills and experience necessary to help ensure a smooth transition.

Act 120-2018 also provides certain protections for current PREPA employees who are assumed by the Contractor. Specifically, Act 120-2018 requires that the Partnership Contract provide that, for any current PREPA employees assumed by a Contractor pursuant to such contract, the Contractor will maintain such employees' current *job classification, seniority criteria, wages, and fringe benefits*. (Act 120-2018 Sec. 15 (incorporating by reference Act 8-2017 Sec. 6.4(4)(10)).) This requirement applies to non-union and union employees. Thus, while Act 120-2018 does not require a Contractor to assume any PREPA collective bargaining agreement, for union employees assumed by a Contractor under the Partnership Contract, the Contractor must maintain job classifications, seniority criteria, wages, and fringe benefits as currently determined by the applicable collective bargaining agreement (except as these fringe benefits have been modified or eliminated by Act 26-2017).

For most government employees (including non-union and union PREPA employees), fringe benefits are currently governed by Act 26-2017, the Fiscal Plan Compliance Act. Act 6-2017 established a uniform fringe benefit system governing vacation leave, sick leave, maternity and paternity leave, special breastfeeding leave with pay, leave without pay, special leave (e.g., court or jury duty leave, blood donation leave, parental involvement leave, military leave), overtime and meal period compensation, holidays, healthcare coverage, annual bonus, and compensatory time off. Under Act 120-2018, these fringe benefits would have to be maintained for current PREPA employees assumed by a Contractor under a Partnership Contract.[3]

For any PREPA employees with 10 or more years of service who are assumed or hired by the Contractor and participate in the retirement system under the Electric Power Authority Employees Retirement System Organic Act, the employees will remain vested and may continue to make individual contributions to the retirement system, and the Contractor must make the corresponding employer contribution. However, "[i]n the case that the new employer has its own Retirement System and the employee chooses to avail him/herself of the same," the Contractor would no longer contribute to the Electric Power Authority Employees Retirement

[2] *But see* Part III *infra* (discussing potential circumstances under which a Contractor may be obligated to assume PREPA collective bargaining agreements and the rights and benefits employees assumed or hired by a Contractor would be entitled to under pending Senate Bill 1121, if enacted).

[3] Generally, PREPA has not considered these fringe benefits, which were substantially reduced or eliminated by Act 26-2017, or current wage rates to be hurdles to efficient operations.

System for that employee. (Act 29-2009 Sec. 10(g) (incorporated by reference by Act 120-2018 Sec. 15).)[4]

Act 120-2018 does not prevent the terms of a Partnership Contract from imposing additional requirements on the Contractor beyond those provided for in that Act.[5]

B. Act 4-2017, Labor Transformation and Flexibility Act

Act 4-2017 amended certain labor laws applicable to private employers that Puerto Rico determined were adversely affecting its ability to reach goals related to its economic stability and development, including creating job opportunities, promoting private sector growth, and reducing unemployment.

Most of these amendments apply to employees regardless of date of employment, but some apply only for employees hired after January 26, 2017. (Act 4-2017 Sec. 1.2.) Under Act 120-2018, and in accordance with Section 6.4, subsection 4(10) of Act 8-2017, current PREPA employees assumed by a Contractor will be exempt from the application of Act 4-2017. That is, any current PREPA employees assumed by a Contractor would be covered by the rights and benefits in place before Act 4-2017. However, an employee and/or labor union representing an employee at the time of hire can agree that the employee will be subject to the amendments implemented under Act 4-2017. (*See* Act 120-2018 Sec. 15 (incorporating by reference Act 8-2017 Sec. 6.4, subsec. 4(10).) Such an agreement, however, could not contravene the minimum

[4] A Contractor cannot condition an employee's hiring on the employee participating in the Contractor's retirement system or the waiver of any rights or benefits to which an employee is entitled under Act 26-2017 or Act 120-2018.

[5] Act 29-2009 Section 10(g) provides that a collective bargaining agreement provision that would impede a Public-Private Partnership transaction will be considered invalid if the Puerto Rico Fiscal Agency and Financial Advisory Authority (AAFAF) certifies that the employer-agency is in precarious financial condition. PREPA's collective bargaining agreements do not have successorship articles or other provisions that expressly prohibit, condition, or otherwise address the sale or transfer of PREPA's business. The Subcontracting and Unit Work articles of those agreements, however, severely limit PREPA's ability to subcontract or transfer functions, services, and installations and significant financial penalties are imposed if those articles are violated. These articles could be interpreted to prohibit the establishment of Public-Private Partnerships because such partnerships may constitute, as a practical matter, subcontracting or a transfer of functions or services. Accordingly, given PREPA's precarious financial condition, the Subcontract and Unit Work articles may be considered invalid. And, if such articles are deemed invalid, Section 10(g) provides that the Contractor will be required to give preference in hiring to affected PREPA employees not transferred to other governmental agencies, including establishing a transition plan to other employment opportunities or retraining. The cost of the plan must be shared equally by the contracting parties.

requirements under Act 120-2018, governing current PREPA employees' rights, or Act 26-2017, governing fringe benefits for government employees, as explained above.[6]

For employees subject to Act 4-2017 (i.e., new hires who are not current PREPA employees or who waive their right to be exempt), the amendments include employer-friendly changes to laws governing the enforceability of employment contracts, overtime, and certain scheduling, work hour, and day-off requirements.[7] Act 4-2017 also amended the requirements for vacation and sick leave benefits and required annual bonuses. Employees also remain covered by applicable Puerto Rico labor law requirements that were not amended by Act 4-2017.

Appendix A to this document contains a summary of some of the amendments under Act 4-2017.

III. LABOR RELATIONS LANDSCAPE AFFECTING LABOR TRANSFORMATION

Puerto Rico has a long history with organized labor, and PREPA's workforce has included unionized employees since the 1940s. It thus has longstanding relationships with the four current unions, which have at times been challenging, including periods of labor unrest. PREPA is prepared to leverage its relationships with the unions as much as possible to ensure a smooth labor transition into the Public-Private Partnership(s). Currently, approximately 3,700 PREPA employees are covered by one of four collective bargaining agreements: Union of Workers in the Electric and Irrigation Industry of Puerto Rico (UTIER), Union of Independent Professional Employees (UIPE), Insular Industrial and Electric Construction Workers Union (UITICE), and Union of Pilots of the Electric Power Authority of Puerto Rico (UPAEE). All four agreements have expired but contain "evergreen" clauses and, therefore, remain in full force and effect, except as modified by law (e.g., Act 26-2017, governing fringe benefits for all public employees).[8]

As explained in Part II(A), under current law, Contractors are not required to assume PREPA's obligations under any collective bargaining agreement and could unilaterally impose work rules.

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[6] A Contractor cannot condition an employee's hiring on the employee's agreement that the employee will be subject to the amendments implemented under Act 4-2017.

[7] Employees classified as administrative, professional, or executive employees under the Federal Fair Labor Standards Act are exempt from certain Puerto Rico labor law requirements, including the overtime, scheduling, vacation, and sick leave requirements, as amended by Act 4-2017. However, current administrative, professional, and executive PREPA employees assumed by a Contractor would benefit from Act 120-2018, and thus the Contractor would have to maintain their job classification, seniority criteria, wages, and fringe benefits (currently governed by Act 26-2017).

[8] Act 3-2017, the Act to Address the Economic, Fiscal, and Budget Crisis to Guarantee the Operations of the Government of Puerto Rico, prohibited increases in economic benefits or extraordinary economic compensation to public employees, including those covered by collective bargaining agreements. Wage increases, increases in employer contributions to benefits plans, and wage differentials were prohibited. Act 3-2017 also prohibited liquidation of vacation or sick leaves (except in case of retirement), Christmas Bonuses in excess of $600, Summer Bonuses in excess of $200, and any other kind of bonuses. Under Act 3-2017, all collective bargaining agreements were extended, with respect to non-economic articles, until June 30, 2021.

However, under certain circumstances, a Contractor may have an obligation to bargain with any of the four unions as a successor employer, as further described below.

A Contractor may be considered a successor employer under the federal National Labor Relations Act ("NLRA") if a majority of its employees in a bargaining unit are former PREPA employees. If so, the Contractor may be able to set initial working rules and conditions at the time of hiring, but would be required to collectively bargain with any duly authorized labor representative under the NLRA or may adopt the collective bargaining agreement in effect.[9]

Additionally, there is a bill currently pending in the Puerto Rico legislature that, if enacted and signed into law, may affect the Contractor's ability to impose work rules unilaterally. Senate Bill 1121 (the Puerto Rico Energy Public Policy Act), if enacted as currently proposed, would provide that—for current PREPA employees who, as a result of Act 120-2018, become employees of a Contractor—the Contractor must preserve all rights acquired under the laws, regulations, norms, or collective bargaining agreements applicable to those employees, as well as all rights and privileges under any applicable pension or retirement plan compatible with Act 26-2017. This conceivably could be interpreted as a guarantee that employees will retain the right to be represented by their current union and that the Contractor must assume all collective bargaining agreements that apply to current PREPA employees assumed or hired by the Contractor as part of a Partnership Contract. Whereas Act 120-2018 requires that a Contractor maintain only the job classification, seniority criteria, wages, and fringe benefits of current PREPA employees assumed under a Partnership Contract, the impact of Senate Bill 1121 would be to require that Contractors also maintain all existing work rules (irrespective of whether an employee was hired or assumed) because the Contractor would be bound by the current collective bargaining agreements.[10]

Even if this bill is not enacted, as a practical matter, a Contractor may wish to take into account the unions' existence and likely insistence on continuing to represent employees under all or some of the terms and conditions of the current collective bargaining agreements.

[9] Under Act 120-2018 (*see supra* Part II(A)), the Contractor must maintain the job classification, seniority criteria, wages, and fringe benefits of any current PREPA employee who is assumed, regardless of what a Contractor may be entitled to do as a successor employer under the NLRA.

[10] Separately, Senate Bill 1121 would also amend Act 120-2018 Sec. 7 to add that all efforts must be made to use the proceeds of the Public-Private Partnership transaction to provide an amount for early retirement for employees who qualify (instead of, as is currently required, improving the capitalization of the Electric Power Authority Employees Retirement System).

List of Referenced Materials

(a) Act 29-2009 (Public-Private Partnership Authority Act)

(b) Act 3-2017 (Act to Address the Economic, Fiscal, and Budget Crisis to Guarantee the Operations of the Government of Puerto Rico)

(c) Act 4-2017 (Labor Transformation and Flexibility Act)

(d) Act 120-2018 (Puerto Rico Electric Power System Transformation Act)

(e) Act 8-2017 (Government of Puerto Rico Human Resources Administration and Transformation Act)

(f) Act 26-2017 (Fiscal Plan Compliance Act)

(g) Senate Bill 1121 (proposed Puerto Rico Energy Public Policy Act)

(h) PREPA-UTIER Collective Bargaining Agreement

(i) PREPA-UIPE Collective Bargaining Agreement

(j) PREPA-UITICE Collective Bargaining Agreement

(k) PREPA-UPAEE Collective Bargaining Agreement

APPENDIX A

Summary of Certain Amendments Under Act 4-2017

This summary does not purport to summarize or otherwise address Act 4-2017 in its entirety. It may not be construed as giving legal advice and any statement made herein may not be used against PREPA, COR3 and/or the authors. All Private Partners are encouraged to review the full text of the statute and seek legal advice regarding all applicable Federal and Puerto Rico laws, regulations and policies.

1) Amendments to Unjust Dismissal Act (Law 80)

   a) The statute of limitations is reduced from three years to one year for claims filed after Act 4-2017 took effect.

   b)

      i. The formula for the indemnity for unjust dismissals after the expiration of the probationary period for those employed after Act 4-2017 took effect increased to three months, plus two weeks' pay per year of service, capped at the equivalent to nine months of salary.

      ii. "Salary" (upon which the indemnity is computed) is now clearly limited to basic salary and commissions. All other compensation (including bonuses, stock grants, stock options, deferred compensation, etc.) is expressly excluded from the computation of the formula.

   c) The automatic probationary employment period for employees hired after the enactment of Act 4-2017 increased to one year for executive, administrative, and professional employees, and to nine months for all other employees. This period can be reduced by mutual consent.

   d) The types of misconduct that constitute just cause for disciplinary dismissals are expanded and more clearly defined.

   e) For layoffs, a new instance of just cause is added "to make the company more competitive." Also, the exception to the rule that inverse seniority in the affected classification must be applied in the selection of the employees to be laid off (in order for the dismissal to be considered with just cause) is liberalized. Now, the less senior employee may be retained over the more senior employee if it is reasonably clear that he/she is better qualified or more efficient or has a better performance or disciplinary record. Also, in multi-plant, -store, or -branch operations only the seniority in the affected classifications in the affected unit need be considered unless substantial employee interchange exists between two or more units in the affected classifications and said units and classifications have common supervision of day-to-day operations.

f) Years of service before an interruption in employment of more than two years will not be counted for seniority or for the indemnity formula.

g) The transfer of a going concern is limited to the purchase of all or part of a business and, among other things, where over 50% of the total employees of the purchaser are former employees of the seller during the first 6 months after the sale.

h) Any severance indemnity, regardless of whether it is mandatory or voluntary, is exempt from income taxation but up to an amount equal to the Act 80 formula.

i) Constructive discharge will require intentional acts of the employer so severe that they leave no other alternative to the employee but to resign.

j) Act 80 severance indemnity can be settled for a lesser amount once the decision of the discharge is communicated.

k) Temporary employment that does not exceed three years (or such term provided in a temporary employment contract of an executive, administrator or professional) is presumed to be valid and, thus, not subject to Act 80.

l) The dismissed employee now has the burden of proving that the dismissal was without cause

2) Amendments to Christmas Bonus

a) The required hours of work to qualify are increased to 1,350. The bonus will be 2% of salary earned up to a bonus of $600 if the employer has more than 20 employees; and $300 if the employer has 20 employees or less. During the first two years of employment, the Bonus will be 50% of said amounts.

b) The Bonus must be paid between November 15 and December 15.

c) The income statement to apply for the exemption from payment of the bonus may be for the accounting year of the employer.

d) Other bonuses paid during the year may be credited to reduce the Christmas bonus if prior written notice was given to the employee.

3) Amendments to Overtime, Meal Period and Closing Law

a) All overtime (and work rendered during meal periods) is payable at 1.5x the regular rate of pay.

b) The definition of the term “day” for purposes of the calculation of daily overtime has changed from any 24-hour period to a calendar day. This will eliminate “technical” overtime caused by changes in the time that the employee begins a workday or takes the meal period. The employer can designate an alternate 2- hour cycle, as long as five days’ prior written notice is given to the employee, and there are at least eight hours between

consecutive workdays. (It is not clear whether the eight-hour hiatus applies also to the calendar day alternative.)

c) Work performed during Sundays is not overtime unless it is in excess of eight hours in the day, 40 hours in the workweek or during a seventh consecutive day of work. No special compensation has to be paid for work on Sundays after 11:00 am.

d) The meal period must begin not before the end of the second hour of work and not after the beginning of the sixth hour of work. If the workday is six or less hours of work, the meal period can be waived.

e) The categories of exempt employees are increased and more clearly defined, and more aligned with the exemptions in the FLSA.

4) Amendments to Vacation and Sick Leaves

a) Employees hired after the enactment of Act 4-2017 accrue vacation leave at: 1/2 day per month during the first year of employment; 3/4 days for years two through five of employment; one day for years six through 14 of employment; and 1 1/4 days for year 15 and beyond of employment. If the employer has up to 12 employees, the accrual is 3/4 days per month. Discharging employees to replace them to benefit from this amendment is illegal.

b) All employees must work at least 130 hours in a month to accrue vacation or sick leave.

c) The statute of limitations to present a salary claim is reduced from three years to one year, except for claims made prior to the enactment of the Act 4-2017.

5) Amendments for Independent Contractors

a) An indisputable legal presumption is established that a person is an independent contractor if he/she meets several specified requirements.

b) If the person does not meet all such requirements, independent contractor status shall be determined by the traditional "common law" test, which depends primarily on the degree of independence that the contractor has in the manner in which it provides the service vis-a-vis the principal's degree of control.

c) Courts are prohibited from using the test of "economic dependence," under which it is easier to prove that a person is an employee.

6) Amendments for Discrimination in Employment

a) Damages for mental anguish, compensatory, or punitive damages are limited to: $50,000 if the employer has fewer than 101 employees; $100,000 if the employer has 101 up to 200 employees; $200,000 if the employer has 201 up to 500 employees; and $300,000 if the employer has more than 500 employees.

b) The presumption of discrimination that applied to the employer, if an alleged discharge or other adverse employment action was without just cause, is eliminated.

c) The employer is not presumed to have known of the situation of an employee who alleges discrimination because he/she is a victim of domestic violence, sexual aggression or stalking.