

MULTIEMPLOYER PENSION PLAN WITHDRAWAL LIABILITY RULES

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Contractors who contribute to multiemployer pension plans by virtue of obligations created by union contracts should be aware that they may have additional financial liability (over and above the contribution amounts stated in the contract) if the plan is or becomes under-funded. While the possibility of withdrawal liability has been in existence since 1980, the incidence of withdrawal liability has accelerated in the last several years due primarily to weak investment performance of these plans. The purpose of this paper is to briefly explain the essential provisions of the withdrawal liability rules and to provide a roadmap for contractors to identify and potentially minimize the financial consequences of withdrawal liability. Of course, because these rules are complicated, contractors with specific issues and concerns should consult with legal counsel.

Definition of Withdrawal Liability and Key Concepts

The rules governing withdrawal liability are found in the Multiemployer Pension Plan Amendments Act of 1980 which amended ERISA to impose withdrawal liability upon employers who cease contributions to a multiemployer defined benefit pension plan with unfunded vested benefits. Withdrawal liability is essentially an exit fee requiring employers to pay its share of a plan's costs (future vested benefits) which have not been paid through previous contributions or investment returns. Withdrawal liability only applies to multiemployer defined benefit pension plans; it does not apply to health and welfare plans, annuity plans or other defined contribution plans.

The funding status of a plan is determined each year by the plan's actuary. Unfunded vested benefits arise when the actuarial value of a plan's vested accrued benefits (the promised future benefits which participants have earned a right to receive) exceeds the value of the plan's assets. These calculations are influenced by various assumptions (investment rate of return, mortality, contribution hours, etc.) and by the level of benefits promised to participants. For example, if the plan does not meet its investment return assumption, an imbalance may result and unfunded vested benefits may be created or increase.

The employer's share of a plan's unfunded vested benefits is a fraction, the numerator is the employer's contributions for the same five year period. This amount can change from year to year depending on the level of unfunded vested benefits and the level of the employer's contributions to the plan compared to all other contributing employers. However, even if a plan has unfunded vested benefits, withdrawal liability will only be assessed to an individual contributing employer under certain circumstances.

Assessment of Withdrawal Liability

There are several circumstances under which a plan may assess withdrawal liability to an employer.

COMPLETE WITHDRAWAL

A complete withdrawal from a pension plan will occur when an employer either:

1. permanently ceases to have an obligation to contribute: or
2. permanently ceases all covered operations under the plan.

PARTIAL WITHDRAWAL

A partial withdrawal from a pension plan will occur when there is a:

1. 70 percent contribution decline measured over a three-year period; or
2. partial cessation of the employer's contributions to the plan under one or more but not all collective bargaining agreements requiring contributions to the plan and the employer continues to perform work in the jurisdiction or transfers such work to another location; or
3. permanent cessation of an obligation to contribute with respect to work performed at one or more but not all facilities but continues to perform work at the facility of the type for which contributions were previously required.

Minimizing or Eliminating Withdrawal Liability

There are a number of exceptions to the withdrawal liability rules.

DE MINIMUS RULES

Withdrawal liability may be reduced by a so-called "de minimis reduction rule." Any withdrawal liability of \$50,000 (or, if less, $\frac{3}{4}$ of 1 percent of the plan's unfunded vested benefits) or less is completely eliminated and between \$50,001 and \$150,000, the reduction is \$50,000 less the liability over \$100,000. The rule has the effect of exempting smaller employers from withdrawal liability.

SALE OF ASSETS/STOCK

Certain business changes may or may not result in a complete or partial withdrawal. A sale of assets by an employer coupled with a cessation of contributions to a plan may trigger a complete or partial withdrawal unless the buyer assumes the contribution obligations and other technical requirements are satisfied. On the other hand, a sale of stock by an employer (or other entity reorganization) will not by itself trigger withdrawal liability if there is no interruption in contributions or obligation to contribute.

CONSTRUCTION INDUSTRY EXEMPTION

Another exception is the so-called "construction industry exemption" rule. Plans which cover primarily building and construction industry employees are eligible to adopt this special rule. Employers are considered construction industry employers if substantially all (85 percent or more) of its employees for which it has a contribution obligation to the plan work in the building and construction industry. Under this rule, a withdrawal occurs only if the employer ceases its obligation to contribute to the plan but continues to work within the jurisdiction of the collective bargaining agreement, or returns to do the same type of work in the jurisdiction within five years, without in either case resuming contribution obligations to the plan. Therefore, if an employer goes out of business, under the provisions of this rule, withdrawal liability would not be assessed. If, however, the employer continued to work in the same jurisdiction (on a non-union basis), withdrawal liability could be assessed by the plan. Partial withdrawal liability would be assessed only when a construction industry employer has substantially shifted its work mix so that only an insubstantial portion of work is covered by the plan.

WHO IS RESPONSIBLE FOR PAYING WITHDRAWAL LIABILITY

Any person or entity acting directly or indirectly as an employer including affiliates and trades or business (whether or not incorporated) under common control. Attempts to evade

withdrawal liability by going out of business and resuming business under a different name will generally be disregarded.

ENFORCEMENT OF WITHDRAWAL LIABILITY

If a plan determines that it believes an employer has withdrawn from the plan, it will generally investigate the circumstances and request information from the employer, usually in a document called a statement of business affairs. The plan generally has the legal right to receive the information requested. If the plan does make a withdrawal liability assessment, the employer has ninety (90) days to contest the assessment and request review by the plan. If the employer does not request a review by the plan during that period, arbitration is barred and the assessment is final. Arbitration is available if a request is made within 60 days after the plan notifies the employer of its final determination, or if earlier, within 120 days of the date the employer seeks the initial review or arbitration may be initiated jointly within 180 days of plan's initial determination. During any review period, the employer must pay installments of assessed withdrawal liability.

ACTION PLAN FOR CONTRACTORS TO ADDRESS WITHDRAWAL LIABILITY CONCERNS

1. Prior to entering into a new union contract by which an obligation is imposed to contribute to a defined benefit plan, determine if withdrawal liability exists prior to signing the contract. If so, attempt to avoid contributing to the defined benefit plan, either by offering to provide other types of retirement vehicles or other financial incentives to employees.
2. For contractors already obligated to contribute, determine whether any of the plans have withdrawal liability. Contractors have the legal right to request in writing from a plan an estimate of the contractors potential withdrawal liability. (ERISA§4221(e)). A sample request letter is attached which should be sent annually to each multiemployer pension plan to which you contribute.
3. Each plan is run by a joint board of Trustees, an equal number of Union Trustees and Management Trustees, who may be appointed by an employer association. Contact the employer association and the individual Management Trustees to determine what steps are being taken to reduce or eliminate the plan's withdrawal liability.
4. If changes are contemplated in the manner in which you intend to operate your business, and withdrawal liability is an issue, consider some strategic planning well in advance of any implementation date of those changes. An awareness of withdrawal liability may well lead to different business and operational procedures and structures which will have the effect of minimizing or eliminating exposure to withdrawal liability. There is some flexibility in this regard.

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