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WEB EXCLUSIVES

Primer on Withdrawal Liability

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Trustees of multiemployer plans have a fiduciary duty to understand and collect withdrawal liability, monitor the plan professionals that provide advice and counsel, make the decisions for their plans and assume responsibility under ERISA. This article provides trustees and administrators with the knowledge they need to carry out their responsibilities.

Introduction

This article is a primer on employer withdrawal liability. We emphasize *primer* because it is directed to trustees and administrators of multiemployer employee benefit plans and is not meant as a technical guide for actuaries and others who need to deal with the intricacies of calculating employer withdrawal liability. We will look at the basics.

The basics of withdrawal liability, however, are enough to frighten not only trustees and administrators, but counsel who are charged with providing guidance under the law. Terms like *de minimis, presumptive method* and *unfunded vested benefits* seem like a foreign language and make even the most seasoned trustees turn the entire process over to the professionals.

Regardless of this daunting task, trustees of multiemployer plans have a fiduciary duty to understand and collect withdrawal liability. They also have an obligation to monitor their professionals, who provide only advice and counsel, while the trustees make the decisions and assume responsibility under ERISA. In this article, we will provide trustees and administrators with the knowledge to carry out that task.

Statutory Basis

In a multiemployer pension fund, there is a flow of contributions and earnings from investments coming into the fund while benefits are being paid out of the fund. The basic function of the actuary is to determine whether the contributions plus future investment earnings are sufficient to fund future benefits. The value of benefits already earned and vested is called the *present value of vested benefits,* or *pvvb.* If the pvvb is greater than the assets, then the fund has unfunded vested benefits that represent a liability for all participating employers.

When ERISA originally was enacted in 1974, an employer could withdraw from a multiemployer fund at will, with no financial consequences, as long as the fund continued to function for five years from the date of withdrawal.[1] At the first sign of financial trouble in these pre-MPPAA plans, employers withdrew in order to avoid liability for unfunded vested benefits. The consequence was an exodus from troubled funds and instability in all funds.

In direct response to this unstable situation and the resulting turmoil in the industries, Congress enacted the Multiemployer Pension Plan Amendments Act (MPPAA) in 1980. The purpose of MPPAA was to allocate unfunded vested benefits equitably to withdrawing employers by calculating their fair share of the liability on the date of withdrawal. Employers that withdraw, completely or partially, are required to contribute to the plan a proportionate share of the unfunded vested benefits and future liabilities. The result is that an employer that withdraws from an underfunded plan may be required to continue to contribute to the plan as before withdrawal until the liability is paid.

The withdrawal liability process consists of four steps:

1. Determining whether the employer has withdrawn
2. Calculating the employer's share of the plan's unfunded vested benefits and determining whether any deductions apply to the liability
3. Notifying the employer of the amount of the withdrawal liability and demanding payment
4. Collecting the liability (which may require arbitration and judicial enforcement). Each of these steps will be discussed in turn.

Has the Employer Withdrawn?

Under MPPAA, a complete withdrawal occurs when an employer:

1. Permanently ceases to have an obligation to contribute under the plan or
2. Permanently ceases all covered operations under the plan.[2]

In most industries, a complete withdrawal therefore occurs when an employer goes out of business, closes the plant, moves the business outside the fund's jurisdiction or goes "nonunion"

and ceases contributions to the fund.[3] In practical terms, complete withdrawal occurs when contributions cease.

A partial withdrawal will arise when only some of the contributions cease (three-year measurement period). As a matter of statute, it occurs on the last day of the plan year in which there is either:

1. A 70% decline in contribution base units or
2. A partial cessation of the employer's contribution obligation.[4]

A partial withdrawal also will occur when there is a substantial reduction in the flow of contributions by an employer into the fund either because of declining business, transferring of operations or converting part of the operation to nonunion status (sometimes known as double breasting). To avoid a withdrawal, the employer must continue the same kind of work in the geographical area covered by the agreement or at other facilities covered under the agreement.

Special Industries

Congress tailored the withdrawal liability definitions in MPPAA to suit the needs of particular industries. These will be briefly discussed below.

Building and construction industry. In the building and construction industry, employer cessations of contributions occur regularly due to the nature of the business. MPPAA contains an exception covering the building and construction industry that narrows the circumstances in which an employer in that industry will be subjected to withdrawal liability. The theory is that the plan's contribution base is generally not diminished because the employees go to work for another employer covered by the plan.

A complete withdrawal by an employer in the building and construction industry is therefore defined differently. It occurs only when the employer ceases to have an obligation to contribute and either:

1. Continues to perform the same or similar work in the jurisdiction of the collective bargaining agreement or
2. Resumes such work within five years of cessation but does not resume the obligation.

As a practical matter, withdrawal in these circumstances will usually be limited to the employer that goes "nonunion," i.e., continues work of the same kind in the same area but not under a collective bargaining agreement. An employer that subcontracts work after cessation of its contribution obligation may also incur liability.[5]

Similarly, *partial withdrawal* occurs only if the employer's obligation is continued for no more than an "insubstantial portion" of the potentially covered work that the employer performs in the craft and area jurisdiction of the collective bargaining agreement.[6]

Entertainment industry. As in the building and construction industry, complete withdrawal occurs in the entertainment industry when the employer either (1) continues to perform the same or similar work in the jurisdiction or (2) resumes work within five years after the obligation to contribute and does not renew the obligation. The prohibition on continuing similar work is somewhat broader than in the building and construction industry.[7]

Trucking, household goods moving and public warehousing industries. The provision applying to the trucking, household goods moving and public warehousing industries is considerably narrower than those applying to the building and construction, and entertainment industries. It applies only to complete withdrawal and comes into play only if "substantially all" the contributions come from employers "primarily" engaged in these trucking-related industries.[8]

Sale of Assets

A sale of assets often will result in the triggering of withdrawal liability. In certain circumstances, MPPAA permits a reduction of liability if the sale is a bona fide sale and the withdrawal occurs simultaneously with the transaction.[9]

To qualify for this exemption, (1) the purchaser must have an obligation to contribute to the fund for substantially the same number of contribution base units as the seller, (2) the purchaser must provide a bond or escrow for five years and (3) the sales contract must make the seller secondarily liable if the purchaser completely or partially withdraws within five years without paying its liability.

It should be noted that a change in corporate structure (e.g., a merger or a consolidation) that does not cause an interruption in the employer's contributions under the plan does not constitute a withdrawal.[10]

Calculation of Withdrawal Liability

The calculation of withdrawal liability is a subject beyond the scope of this primer. Generally, when determining the amount of liability, the fund must first calculate the plan's unfunded vested benefits. Second, the fund must determine the employer's share of the plan's unfunded vested benefits, based on one of the four different methods. Third, the fund must consider various statutory relief provisions, which may reduce liability.

De Minimis Rule

The *de minimis* rule was enacted by Congress to ease the burden on small employers or employers with infrequent contact with the fund.[11] The "mandatory" *de minimis* rule provides that an employer's liability is waived in full if its share of unfunded vested benefits is less than the smaller of $50,000 or 0.75% of the total liability of the plan. If the employer's share is between $50,000 and $150,000, it is reduced but not eliminated. Above $150,000, the employer loses the benefit of the *de minimis* rule. However, the plan may increase the $50,000 and $150,000 limits to $100,000 and $250,000, respectively.[12]

Free Look

A *free look* entitles employers to participate in a fund for a short, specific period of time without incurring withdrawal liability, typically five years or less. The obvious purpose of this rule is to encourage employers to participate in a fund in the hope that these employers will remain in the future.[13]

Notice of Withdrawal Liability

Detecting Withdrawal Liability

Every fund subject to MPPAA should have a system for monitoring employers and detecting instances of withdrawal liability. If the fund receives contribution reports on a monthly basis, a review of those reports is the first step in determining whether there is a complete or partial withdrawal. A sharp decrease in the contribution rate should be investigated.

Unfortunately, contribution reports cannot be relied upon exclusively. For example, some industries have sharp seasonal variations in contribution rates that correspond to fluctuations in industry em-

ployment. In the exempted industries, such as the building and construction industry, special rules apply that complicate the process. The contribution reports of an employer in that industry may show zero contributions; however, unless that employer commences the same type of work in the same jurisdiction and performs the work outside the collective bargaining agreement, no withdrawal has occurred.

In all industries, and especially in the building and construction, and entertainment industries, union representatives can provide critical information to the fund. While a fund administrator cannot interpret a zero contribution level from a previously active employer, a business agent knows the status of the company. Any employer that ceases contributions as a consequence of going "nonunion" or out of business will have engaged in a complete withdrawal from the fund, and the fund should solicit such information from those in the field.

One exception to this rule is the "strike and other labor disputes" exception, which states that an employer shall not be considered to have withdrawn if the "employer suspends contributions under the plan during a labor dispute involving its employees."[14] However, if the employer permanently ceases to contribute, it cannot avail itself of this provision and will be subject to withdrawal liability. If a labor dispute ends and the employer does not resume operations, or is no longer covered by the collective bargaining agreement, the date of withdrawal is the date on which the employer ceased contributions.[15]

All businesses that are "under common control" are treated as a single employer for purposes of withdrawal liability. Thus, if two companies in the same control group both contribute to a plan and one ceases operations, a complete withdrawal will not have occurred, because the employer has not completely ceased its contribution obligation. However, a partial withdrawal will have occurred, and withdrawal liability can be assessed against all members of the control group. The purpose of the common control provision is to ensure that employers will not avoid their MPPAA obligations by operating through separate entities. Consequently, withdrawal liability can be assessed against all members of the control group, even if only one member is required to contribute to the multiemployer plan. In seeking to impose liability on related entities and individuals, the fund can take advantage of both the "control group" rules of MPPAA[16] and the normal alter ego or piercing the corporate veil rules that govern employer delinquencies.[17]

Demand by the Fund

Once a withdrawal or partial withdrawal has been detected, the fund must send a demand to the withdrawing employer. While MPPAA gives the fund the power to request information of the employer,[18] in the majority of cases it is easier for the fund to send the notice and wait for the employer's response. Not later than 90 days after receipt of the notice and demand, the employer may ask for review of the fund's determination.[19]

The letter sent by the fund to the employer is the triggering mechanism for the withdrawal liability process: (1) The employer must be notified that it is the fund's position that a withdrawal has occurred; (2) a payment schedule should be stated in the letter; and (3) demand for payment in accordance with the schedule must be made.[20] Notice to one member of a "control group" is considered notice to the entire group.[21]

The "as Soon as Practicable" Requirement

MPPAA states that the fund should send out a notice of withdrawal liability "as soon as practicable." It is to the fund's advantage to issue demand to an employer shortly after withdrawal or partial withdrawal has been detected. This is especially important because interest generally does not accrue between the employer's withdrawal and the fund's demand for payment (though some courts have recognized an exception for interest accruing during the year of withdrawal).[22]

What happens if the fund delays? The fund remains in the driver's seat even if substantial delay occurs.

MPPAA provides that a civil action must be brought within six years of the time the "cause of action arises." When does a "cause of action arise" in a withdrawal liability case? In *Joyce v. Clyde Sandoz Masonry,*[23] a group of employers withdrew from the fund in 1981 but, due to the special construction industry exemption,[24] the withdrawal went undetected until 1987. Having received notice in July 1987, the employer contended that the fund missed the six-year statute of limitations by days because withdrawal occurred on June 30, 1981, when the contract expired. The United States Court of Appeals for the District of Columbia Circuit disagreed, ruling that a "cause of action" does not "arise" until the fund sends the demand notice to the employer.[25] This decision was later adopted by the United States Supreme Court in *Bay Area Laundry v. Ferbar Corp.,* 522 U.S. 192 (1997).

Collecting the Liability

The Employer's Response

A typical response to the demand letter by the employer is to request a "review" of the determination and to demand that the fund produce a mass of documents and calculations. ERISA allows an employer to request such a review from the fund, but the employer must do so within 90 days after the fund demands payment.[26] This stage of the process can be viewed as the "battle of letters" between employer counsel and fund counsel.

On the merits, the employer may raise a host of defenses, including that the actuarial assumptions of the fund were incorrect; there was not a complete withdrawal; the employer is not in the control group alleged by the fund; or the fund has waited too long to seek recovery. Each contention must be addressed by the fund.

Default and Demand for Arbitration

The demand for payment establishes the amount of withdrawal liability that is due, unless the employer can either (1) convince the fund that the demand is wrong or (2) defeat the demand in arbitration.

If the employer does not respond according to the dictates of MPPAA, it will waive all defenses[27] and find itself in "default."[28] Default occurs when an employer fails to make payment "when due" and the employer fails to pay or take proper action within 60 days after it receives fund notification of such failure.[29] Upon default, the employer loses its right to arbitrate.

If the employer fails to demand arbitration within the time period required by MPPAA, "the amounts demanded by the [fund] . . . shall be due and owing on the schedule set forth by the [fund in the original demand]."[30]

Interim Payments

The most potent weapon possessed by

the fund in the withdrawal liability collection process is the ability to assess interim payments.[31] MPPAA provides that withdrawal liability "shall be payable in accordance with the schedule set forth by the plan sponsor . . . no later than 60 days after the date of the demand notwithstanding any request for review or appeal."[32] Payments under the schedule "shall" be made by the employer "until" the arbitrator renders a decision. If the employer fails to make these interim payments, the employer "shall be treated as being delinquent."[33] This process has been described as "pay now, dispute later."

Once the "review" process is completed, there is an affirmative duty on the part of the employer to make interim payments. If the employer fails to respond to counsel's demand for whatever interim payments are due, suit should be filed seeking (l) the interim payments, (2) interest,[34] (3) liquidated damages and (4) attorney fees and costs.[35]

Funds have been successful in obtaining interim awards. While there is one case indicating that the ability of the employer to pay could be relevant to the court's consideration,[36] most courts routinely award interim payments, often resulting in the speedy settlement of withdrawal liability cases on terms favorable to the fund.[37]

Arbitration

The Pension Benefit Guaranty Corporation (PBGC) has issued regulations that govern the resolution of withdrawal liability disputes under the arbitration mechanism.[38] The MPPAA arbitration procedures[39] are similar to those used in other contexts, such as labor and commercial arbitration. The courts generally have deferred to arbitration, and that is especially true under MPPAA.[40] Efforts to enjoin MPPAA arbitrations rarely have been successful.[41] Courts have held that all disputes involving withdrawal liability under MPPAA must first be resolved in arbitration before the parties may bring suit.[42]

Burden of Proof

MPPAA provides that the fund's determination of the employer's liability is presumptively correct.[43] While this provision was challenged on constitutional grounds, the Supreme Court ruled that shifting of the burden of persuasion does not violate due process.[44] Most MPPAA arbitrators therefore will rule that the employer has the burden of proceeding first with its case and of proving by a preponderance of evidence that the fund's determination is wrong. Fund counsel should emphasize that the employer has the burden of proof.

Relevant and Nonrelevant Issues

An employer often will respond to a demand for withdrawal liability by challenging the manner in which the trustees conduct the affairs of the fund or focusing upon other "irregularities" in the practices of the fund. Unless, however, those irregularities affect the actuarial assumptions and methods underlying the withdrawal liability calculation or resulted in a "significant error" with respect to that calculation, they cannot be considered. This was precisely the lesson of *Trustees of Retirement Fund of Fur Mfg. Indus. v. Lazar-Wisotzky,*[45] in which the employer argued that its withdrawal liability had been increased because some employers had contributed on behalf of persons who were not their employees, and because the fund had paid disproportionately large benefits to some employees. The court rejected this defense and held that "[t]hese contentions are irrelevant to the motions presently before the Court. Allegations of disparity or other improprieties in the contractual basis for contributions to the Fund do not absolve an employer of its statutory duties under the Act, but rather, may afford it a cause of action against the Trustees."[46]

Enforcing the Award

As in any collection litigation, it may be necessary to conduct discovery in aid of execution of the judgment.[47] A deposition notice should be issued to the principal of the company, together with a notice to produce financial records. It is also within the fund's authority to depose third parties in aid of execution. In the event that financial resources have been dissipated, the fund should trace the funds to any alter ego or related entities. As previously noted, because of the control group definition of the employer, all members of the same control group of the company that withdrew from the plan are liable, whether or not the other group members are themselves contributing employers.[48]

Attorney Fees

The law is very favorable to funds in determining attorney fees. Funds often recover fees, but prevailing employers cannot obtain fees against the fund unless the action was frivolous, unreasonable or without foundation.[49]

Bankruptcy

There have been a number of decisions that deal with the issue of employer withdrawal liability in the context of a bankruptcy. If the withdrawal occurs after the bankruptcy is filed, it is not part of the bankruptcy estate.[50] Additionally, an employer can be required to make interim payments while awaiting liquidation.[51]

Conclusions

Armed with the basics of withdrawal liability, trustees and administrators of pension funds can properly monitor their professionals and carry out their fiduciary duties under ERISA. **B&C**

Endnotes

1. ERISA §4203(a), 29 U.S.C. §1383(a).
2. ERISA §4203(a), 29 U.S.C. §1383(a).
3. *Textile Workers Pensions Fund v. Standard Dye & Finishing Co.,* 607 F.Supp. 570 (S.D.N.Y. 1985).
4. See, e.g., *Wilson Chevrolet Co. National Indus. Group Pension Plan,* 7 EBC 1475 (1985) (Nagle, Arb.).
5. ERISA §4205(b)(1), 29 U.S.C. §1385(b)(1). "Substantially all" employees must be in the construction industry. *Cent. States, Southeast & Southwest Areas Pension Fund v. Robinson Cartage Co.,* 55 F.3d 1318 (7th Cir. 1995).
6. *H.C. Elliott, Inc. v. Carpenters Trust Fund,* 859 F.2d 808 (9th Cir. 1988), *cert. denied,* 490 U.S. 1036 (1989).
7. ERISA §4208(d)(1), 29 U.S.C. §1388(d)(1).
8. ERISA §4208(c)(1), 29 U.S.C. §1383(c)(1).
9. See *Hankin Transp. Personal, Inc. v. Teamsters 641 Pension Fund,* 14 EBC 2852 (1991) (Percles, Arb.).
10. ERISA §4204, 29 U.S.C. §1384.
11. ERISA §4209(a), 29 U.S.C. §1389.
12. ERISA §4209, 29 U.S.C. §1389.
13. *Cent. States, Southeast & Southwest Areas Pension Fund v. Six Transfer Cartage Co.,* No. 98 C2632, 1999 U.S. Dist. LEXIS 8329, at *9-*10 (N.D.Ill. May 18, 1999).
14. ERISA §4218(2), 29 U.S.C. §1398(2). See, e.g., *T.I.M.E.-DC, Inc. v. I.A.M. Nat'l Pension Fund,* 597 F.Supp. 256 (D.D.C. 1984); *T.I.M.E.-DC, Inc. v. Trucking Employees of North Jersey Welfare Fund,* 560 F.Supp. 294 (E.D.N.Y. 1983).
15. *Combs v. Adkins & Adkins Coal Co.,* 597 F.Supp. 122 (D.D.C. 1984).
16. *Bd. Of Trs. of Trucking Employees of N. Jersey Welfare Fund, Inc. v. Centra,* 983 F.2d 495 (3d Cir. 1992); *Local 478 Trucking & Allied Indus.*

Pension Fund v. Jayne, 778 F.Supp. 1289, 1303-06 (D.N.J. 1991).

17. *I.A.N. Nat'l Pension Fund, Pension Plan A v. Wakefield Indus., Inc.,* 14 EBC 1890 (D.D.C. 1991); *Central States, Southeast & Southwest Area Pension Fund v. Minneapolis Van & Warehouse Co.,* 764 F.Supp. 1289 (N.D.Ill. 1991) (imposing constructive trust on shareholder who took corporate assets). See also *supra* at 101-105.

18. ERISA §4219(a), 29 U.S.C. §1399(a).

19. ERISA §4219(b), 29 U.S.C. §1399(b).

20. A sample letter is included at Appendix J.

21. *McDonald v. Centra, Inc.,* 946 F.2d 1059, 1062 (4th Cir. 1991), *cert denied,* 112 S.Ct. 2325 (1992).

22. See *Joyce v. Clyde Sandoz Masonry,* 871 F.23 1119, 1126-27 (D.C.Cir.), *cert denied,* 493 U.S. 918 (1989); *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.,* 9 EBC 2385 2404-05 (1988) (Arb. Siegel) (no predemand interest accrues); *Du Art Film Lab, Inc. v. Motion Picture Lab. Technicians Local 702 Pension Fund,* 10 EBC 1326 (S.D.N.Y. 1988) (interest accrues for the year of withdrawal).

23. 871 F.2d at 1119.

24. As explained *supra* at 114, no withdrawal occurs in the building and construction industry even if an employer ceases contributions because it is assumed the workers will be employed by other participating employers. Under such circumstances, the fund cannot rely on a decrease in contribution levels.

25. *Joyce,* 871 F.2d at 1122-23. In response to the employer's contention that a fund could wait for long periods to send such a notice and thereby indefinitely suspend the statute of limitations, the court ruled that the "as soon as practicable" requirement, similar to a "laches" provision, would preclude that result. Id. at 1125-26. The "as soon as practicable" issue, however, is for the arbitrator, not the court. Id. at 1127.

26. ERISA §4219(b)(2)(A), 29 U.S.C. §1401.

27. *Robbins v. Admiral Merchants Motor Freight, Inc.,* 846 F.2d 1054, 1055-1056 (7th Cir. 1988); *New York State Teamsters Conference Pension & Retirement Fund v. McNicholas Transp. Co.,* 848 F.2d 20 (2d Cir. 1988).

28. 29 CFR Part 2644(2)(b).

29. ERISA §4219(c)(5), 29 U.S.C. §1399(c)(5).

30. ERISA §4221(b)(1), 29 U.S.C. §1401(b)(1).

31. See *Bowers v. Compania Peruana de Varpors, S.A.,* 689 F.Supp. 215 (S.D.N.Y. 1988).

32. ERISA §4219(c)(2), 29 U.S.C. §1399(c)(2).

33. ERISA §4221(d), 29 U.S.C. §1401(d).

34. See 29 CFR Part 2644.

35. *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128, 134 (3d Cir. 1986), *aff'd per curiam by equally divided court,* 481 U.S. 735 (1987).

36. *Robbins v. McNicholas Transp. Co.,* 819 F.2d 682, 685 (7th Cir. 1987).

37. *Trustees of Chicago Truck Drivers Helpers & Warehouse Workers Union (Independent) Pension Fund v. Rentar Indus., Inc.,* 951 F.2d 1152 (7th Cir. 1991).

38. 29 C.F.R. §§2641-2648.

39. ERISA §4221, 29 U.S.C. §1401.

40. See *PMTA-ILA Pension Fund v. E.W. Coslett & Sons, Inc.,* 6 EBC 2705, 2708-11 (1985) (Jaffe, Arb.).

41. *Central States, Southeast and Southwest Areas Pension Funds v. T.I.M.E.-DC, Inc.,* 826 F.2d 320 (8th Cir. 1987).

42. *Mason & Dixon Tank Lines, Inc. v. Central States Southeast & Southwest Areas Pension Fund,* 852 F.2d 156 (6th Cir. 1988).

43. ERISA §4221(a)(3)(A), 29 U.S.C. §1401(a)(3)(A).

44. *Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California,* ____U.S.____ (June 14, 1993), 1993 U.S. Lexis 4054, 61 U.S.L.W. 4605.

45. 550 F.Supp. 35 (S.D.N.Y. 1982), *aff'd mem.,* 738 F.2d 419 (2d Cir. 1984).

46. Id. at 37.

47. Fed. R. Civ. P. 69.

48. See *supra* at 118.

49. *Dorn's Transp., Inc. v. Teamsters Pension Trust Fund,* 799 F.2d 45 (3d Cir. 1986).

50. EWL is not the property of the estate if withdrawal occurs after the petition is filed. *Bd of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.,* 296 F.3d 164, 170 (3d Cir. 2002).

51. Bankrupt employer not exempt from interim payments while awaiting liquidation. *Cent. States Southeast & Southwest Areas Pension Fund v. Chathan Props,* 929 F.2d 260 (6th Cir. 1991).

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